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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 150.

ROSEWELL E. MESSINGER, PETITIONER,

vs.

PETER ANDERSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 21, 1909.
CERTIORARI AND RETURN FILED DECEMBER 1, 1909.

(21,874.)[13]

(21,874.)

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INDEX.

	Original.	Print
Transcript of record from the circuit court of the United States for the northern district of Ohio in case of Peter Anderson, plaintiff in error, *vs.* Rosewell E. Messenger, No. 1479, filed August 28, 1905.	*a*	1
Plaintiff in error's suggestions of parts of the record to be printed.	1	1
Defendant in error's suggestions of parts of the record to be printed.	3	4
Petition	4	5
Demurrer	6	7
Continuance	7	8
Agreement that cause may be heard by the court without the intervention of a jury	7	8
Hearing	8	8
Motion for new trial	8	9
Judgment for defendant	9	9
Bill of exceptions	10	10

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 8, 1911.

	Original	Print
Stipulation No. 1—Agreed statement of facts	14	13
Exhibit A—Last will and testament of Henry Anderson	22	20
B—Deed from trustees and executors of Henry Anderson to Charles Butler, Oct. 1, 1855	27	24
C—Deed from trustees and executors of Henry Anderson to Charles Butler, April 16, 1860	30	27
D—Agreement between Charles Butler and W. Anderson, October 10, 1849	33	29
D^2—Acknowledgment by James H. Anderson	36	31
D^3—Quitclaim deed from James H. Anderson and wife to Charles Butler, April 7, 1860	39	34
E—Agreement between Henry Anderson and Charles Butler, October 4, 1844	41	35
F—Deed from Sidney Bissell *et al.* to Charles Butler, February 22, 1843	43	37
G—Agreement between Charles Butler and Henry Anderson, September 21, 1841	45	38
Stipulation No. 2—Agreed statement of facts	47	40
Exhibit A—List of instruments, books, &c., delivered to Oliver B. Snider by Willard Parker Butler, June 1, 1905	50	42
Stipulation No. 3—Agreed statement of facts, &c	51	43
Stipulation No. 4—Agreed statement of facts, &c	53	45
Stipulation No. 5—Agreed statement of facts	54	46
Letter of Charles Butler to W. Goodman, December 28, 1858	55	47
Statement accompanying foregoing letter	56	48
Letter of P. Anderson, May 4, 1859	57	48
Letter of Charles Butler to J. H. Anderson, February 25, 1860	58	50
Letter of Charles Butler to W. Goodman, March 2, 1860	60	51
Letter of W. Goodman to Charles Butler, March 19, 1860	61	52
Letter of Charles Butler to J. H. Anderson, May 7, 1860	61	52
Letter of Charles Butler, February 25, 1860	62	53
Letter of Charles Butler to J. H. Anderson, August 9, 1860	63	54
Letter of Charles Butler to J. H. Anderson, February 1, 1861	64	54
Certificates of judge and clerk of court of common pleas, Lucas county, Ohio	64	54
Defendant's Exhibit No. 8—Statement of note to Henry Anderson, October 1, 1852	65	55
10—Receipt of W. Goodman, October 6, 1849	66	56
9—Receipt of P. Anderson, October 1, 1850	66	56

	Original	Print
Defendant's Exhibit No. 11—Receipt of W. Goodman, May 12, 1855	66	56
12—Note of Charles Butler, October 1, 1853	66	56
13—Receipt of W. Goodman, September 27, 1852	67	57
14—Draft of J. H. Anderson, March 8, 1861	67	57
Notice to produce letters and documents	68	58
Order allowing bill of exceptions	72	61
Petition for writ of error	72	61
Assignment of errors	73	62
Order allowing writ of error	76	64
Writ of error	76	65
Clerk's certificate	77	65
Citation and service	78	66
Order extending time to file record	79	67
Appearance for plaintiff in error	80	67
Order beginning hearing	80	67
Order continuing hearing	81	67
Order submitting cause	82	68
Judgment	82	68
Opinion by Severens, J., July 5, 1906	84	69

Transcript of record from the circuit court of the United States for the northern district of Ohio in case of Peter Anderson *vs.* Rosewell E. Messenger, No. 1679, filed April 11, 1907. a 91

Petition	1	93
Answer	3	95
Judgment on mandate	4	96
Motion to withdraw clause 9 of stipulation No. 1	5	97
Order granting leave to withdraw clause 9 of stipulation No. 1	6	98
Orders as to hearing	7	99
Bill of exceptions on motion to withdraw stipulation No. 1	8	100
Exhibit 1—Motion to withdraw clause 9 of stipulation	9	102
2—Affidavit of W. P. Butler	10	103
Affidavit of Emily O. Butler	11	104
Affidavit of O. B. Snider	12	105
Exhibit "A" offered	13	106
Exhibit "B"—Deed from Peter Anderson and Walter Goodman, executors of Henry Anderson, deceased, to Charles Butler, Oct. 1, 1855	14	107
Letter of March 2, 1860, Chas. Butler to W. Goodman (45)	17	109
Letter of February 25, 1860, Charles Butler to H. Goodman (49)	18	110
Order allowing bill of exceptions on motion to withdraw stipulation	20	112
Trial concluded; verdict for defendant	20	112
Verdict	20	113
Motion for new trial	21	113
Judgment	22	114

	Original	Print
Motion for new trial overruled	22	114
Bill of exceptions	22	114
Stipulation No. 1, eight sections	23	115
Exhibit "A"—Will of Henry Anderson	27	118
"E"—Contract between Henry Anderson and Charles Butler, dated October 4, 1844	32	123
Stipulation No. 5	34	124
Cross-examination of Rosewell E. Messenger	36	126
Section 8 of stipulation No. 3	36	126
Plaintiff rests	36	126
Deed from Anderson to Butler, October 1, 1855	37	127
Exhibit "C"—Deed from Peter Lucas, executor of Henry Anderson, deceased, to Charles Butler, dated April 16, 1860	40	129
"D"—Deed from James H. Anderson to Charles Butler, dated April 7, 1860	43	132
Deed from Charles Butler and wife to Calvin Bronson (certified copy)	45	133
Original deed from Charles Butler and wife to Calvin Bronson offered in evidence	47	136
Exhibit "F"—Deed from Sidney Bissell to Charles Butler, dated February 22, 1843	48	136
Section 13, stipulation No. 1	50	138
Section 14, stipulation No. 1	51	139
Section 16, stipulation No. 1	51	139
Agreement of counsel as to the date of the probate of the will of Henry Anderson	51	139
Deed, city clerk of Toledo to Charles Butler, lot No. 20	52	140
Deed, city clerk of Toledo to Charles Butler, lot No. 30	53	141
Deed, city clerk of Toledo to Charles Butler, lot No. 31	55	143
Deed, city clerk of Toledo to Charles Butler, lot No. 32	56	144
Deed, city clerk of Toledo to Charles Butler, lot No. 33	58	146
Deed, city clerk of Toledo to Charles Butler, lot No. 1008	60	148
Deed, city clerk of Toledo to Charles Butler, lot No. 1009	62	150
Deed, city clerk of Toledo to Charles Butler, lot No. 1008½	63	151
Exhibit "A"—Ordinance passed March 4, 1841	69	156
"B"—Ordinance passed October 23, 1841	70	157
"C"—Resolution passed February 4, 1843	71	158
"D"—Ordinance passed June 26, 1843	71	158
"E"—Ordinance passed November 7, 1843	73	160
"F"—Resolution passed December 23, 1847	73	160
"G" Proceedings of the council of the city of Toledo, dated January 10, 1843	73	160
"H"—Resolution passed January 10, 1843, with original oaths, etc	75	162
"I"—Additional original oaths of Samuel Allen and Samuel B. Scott, dated Feb. 2, 1843	76	163
"J"—Original additional affirmation of Isaac S. Smith, dated January 15, 1843	76	163
"K"—Notice of proposed improvement	77	164
"L"—Proceedings of city council, Feb. 18, 1843	78	165
"M"—Proceedings of city council, May 10, 1843	79	166

	Original	Print
Exhibit "N"—Report of special committee appointed to estimate expenses, etc., for making certain improvements	79	166
"O"—Proceedings of council, March 20, 1843	81	168
"P"—Proceedings of council, April 4, 1843	81	168
"Q"—Proceedings of council, April 8, 1843	82	169
"R"—Proceedings of council, May 4, 1843	82	169
"S"—Report of special committee, dated May 15, 1843	82	170
"T"—Tax duplicate for the year 1843	86	173
"U"—Tax record for the year 1843	88	176
"V"—Tax duplicate for the year 1844	89	177
"W"—Tax record for the year 1844	91	179
"X"—Tax duplicate for the year 1845	91	180
"Y"—Tax record for the year 1845	93	182
"Z"—Tax duplicate for the year 1846	95	185
"A-A"—Tax record for the year 1846	97	186
"B-B"—Tax duplicate for the year 1847	100	190
"C-C"—Tax record for the year 1847	101	191
"D-D"—Record of lots returned delinquent by the treasurer for the year 1847	103	194
"E-E"—Record of tax sales on Monday, 27th day of December, 1847	105	196
Papers No. 1 to 6 in the case of Lot Clark *vs.* The City of Toledo	107	197
Agreement as to the ownership of certain lots in the Port Lawrence division of the city of Toledo	111	202
Agreement as to the testimony of the county clerk of Lucas county	111	202
Report of Chas. W. Hill, special committee	111	202
Stipulation as to the introduction in evidence of the original charter of the city of Toledo and the amendments thereto	113	203
Defendant rests	114	204
Section 9 of stipulation No. 1	114	204
Letter from Charles Butler to W. Goodman, dated March 2, 1860	115	205
Letter from Charles Butler to H. Goodman, dated February 25, 1860	116	206
Sections 1, 2, and 6 of stipulation No. 2	117	207
Exhibit "A" to stipulation No. 2—List of papers	119	209
Section 3 of stipulation No. 3	120	209
Stipulation No. 4, as to facts	121	210
Plaintiff rests	122	211
Contract of sale between Charles Butler and Calvin Bronson, February 18, 1860	122	211
Sections 3, 4, 5, and 7 of stipulation No. 2	125	214
Sections 4, 5, 6, 7, and 9 of stipulation No. 3	127	215
Record from probate court as to will of Henry Anderson	127	215
Admissions as to accounts	128	215
Defendant's Exhibit No. 8—Statement of note to Henry Anderson, October 1, 1852	129	217
No. 9—Receipt, October 1, 1850	130	218

	Original	Print
Defendant's Exhibit No. 10—Receipt, October 6, 1849	130	218
No. 11—Receipt, May 12, 1855	130	218
No. 12—Note of October 1, 1853	130	219
No. 13—Receipt, September 27, 1852	131	219
No. 14—Draft of March 8, 1861	131	220
Letter of W. Goodman to Charles Butler, March 19, 1860	132	220
Letter of P. Anderson, May 4, 1859	132	220
Defendant rests	134	222
Motions for verdict, &c	134	222
Exhibit "D" to stipulation No. 1—Agreement between Charles Butler and W. Anderson, dated Oct. 10, 1849	135	223
Exhibit "D-2" to stipulation No. 1	138	225
Letter, Charles Butler to J. H. Anderson, dated July 28, 1858	141	228
Letter, Charles Butler to W. Goodman, dated March 19, 1860	142	229
Financial report of the treasurer of the city of Toledo for the year 1847	144	231
Letter from Charles Butler to Walter Goodman, dated June 15, 1848	145	232
Letter, Charles Butler to W. Goodman, dated February 9, 1849	145	232
Letter, Charles Butler to P. Anderson, dated Feb. 23, 1849	149	235
Letter, Charles Butler to W. Goodman, dated April 10, 1849	151	237
Exhibit "G"—Agreement between Charles Butler and Henry Anderson, dated Sept. 21, 1841	153	239
Motion to direct a verdict for plaintiff overruled	154	240
Peremptory instruction for defendant	155	240
Judge's certificate to bill of exceptions	155	240
Order allowing bill of exceptions	155	240
Petition for writ of error	156	241
Order granting writ of error	156	241
Assignment of errors	156	242
Precipe for transcript	163	248
Writ of error	164	248
Citation	165	249
Bond	166	250
Clerk's certificate	167	250
Order beginning argument	169	252
Order concluding argument	169	252
Judgment	170	253
Opinion, December 3, 1907	172	254

Transcript of record from the circuit court of the United States for the northern district of Ohio in the case of Rosewell E. Messinger *vs.* Peter Anderson, No. 1916, filed December 29, 1908	*a*	263
Stipulation as to printing record	1	265
Petition	2	266
Order granting leave to defendant to file an amended and supplemental answer	4	268
Amended and supplemental answer	4	268

	Original	Print
Reply to amended and supplemental answer	27	287
Motion to strike from reply to amended and supplemental answer	28	288
Motion for leave to file a supplement to the third defense of the amended and supplemental answer	30	290
Motion to stay	30	290
Supplement to third defense of the amended and supplemental answer	33	293
Reply to supplement to third defense of the amended and supplemental answer	39	298
Amendment to petition	40	299
Order on motions, etc	41	300
Verdict and judgment for plaintiff for $46,904.00	41	300
Motion for a new trial	43	302
Motion to extend order staying the issuance of a writ of possession, etc	44	303
Order staying the issuance of writ of possession, etc	44	303
Order overruling motion for a new trial upon plaintiff remitting the sum of $20,904.11 from the judgment	45	304
Stipulation with reference to copying the exhibits upon the records	46	305
Bill of exceptions	47	306
Offers, etc	47	306
Section 1 of stipulation No. 1	49	307
Section 2 of stipulation No. 1	50	308
Section 3 of stipulation No. 1	51	309
Section 4 of stipulation No. 1	54	312
Section 5 of stipulation No. 1	60	317
Section 6 of stipulation No. 1	60	317
Section 7 of stipulation No. 1	61	317
Section 8 of stipulation No. 1	62	318
Stipulation No. 5	62	318
Section 8 of stipulation No. 3	64	320
Plaintiff rests	65	321
Transcript of record and proceedings in the court of common pleas of Lucas county, Ohio, in the case of Peter Anderson *vs.* The United Realty Company *et al.*, No. 53924	65	321
Precipe for summons	66	322
Petition	67	323
Separate amended answer of Rosewell E. Messinger	69	324
Reply	76	331
Order that the evidence be reported by stenographer	78	332
Verdict	79	334
Order overruling motion for a new trial and entering judgment on the verdict	79	334
Bill of exceptions	80	335
Exhibits attached to the bill of exceptions	84	339
Exhibit No. 1—Stipulation	84	339
Exhibit "A" to stipulation—Contract between Henry Anderson and Charles Butler, dated October 4, 1844	98	350
Exhibit "B" to stipulation—Copy of will of Henry Anderson	100	352

	Original	Print
Exhibit "C" to stipulation—Deed from Peter Anderson and Walter Goodman, executors, etc., to Charles Butler, dated October 1, 1855	105	356
Exhibit "D" to stipulation—Deed from Peter W. Lucas, trustee, to Charles Butler, dated April 16, 1860	108	358
Exhibit "G" to stipulation—Quitclaim deed from James H. Anderson and wife to Charles Butler, dated April 7, 1860	111	361
Exhibit "H" to stipulation—Deed from Edward Bissell *et al.* to Charles Butler, dated February 22, 1843	113	363
Exhibit "I" to stipulation—Agreement between Charles Butler and Henry Anderson, dated September 21, 1841	115	365
Exhibit "J" to stipulation—List of written instruments, etc., delivered to Oliver B. Snider	116	366
Exhibit No. 2—Deed from Edson Allen, master commissioner, to Henry Anderson, dated November 18, 1844	117	367
No. 3—Deed from Sidney Bissell *et al.* to Charles Butler, dated February 22, 1843	122	371
No. 4—Deed from Peter Anderson and Walter Goodman, executors, etc., to Charles Butler, October 1, 1855	124	373
No. 5—Deed from Peter W. Lucas, executor, to Charles Butler, dated April 16, 1860	127	376
No. 6—Deed from James H. Anderson and wife to Charles Butler, dated April 7, 1860	130	378
No. 7—Deed from Charles Butler and wife to Calvin Bronson, dated April 23, 1860	132	380
Exhibits No. 8-14—Tax deeds	134	382
Exhibit No. 19—Statement of note to Henry Anderson, October 1, 1852	144	393
No. 20—Receipt of W. Goodman, executor, to Charles Butler, dated Sept. 27, 1852	145	394
No. 21—Receipt of P. Anderson, executor, to Charles Butler, dated October 1, 1850	145	394
No. 22—Receipt of W. Goodman, executor, to Charles Butler, dated October 6, 1849	145	395
No. 23—Receipt of W. Goodman, executor, to Charles Butler, dated May 12, 1855	145	395
No. 24—Note of Charles Butler, dated October 1, 1853	145	395
No. 25—Receipt of W. Goodman, executor, to Charles Butler, dated Sept. 27, 1852	146	395
No. 26—Receipt of W. Goodman, executor, to Charles Butler, dated Sept. —, 1852	146	396
No. 27—Draft by James H. Anderson on Charles Butler, dated March 8, 1861	146	396
No. 29—Letter from W. Goodman to Charles Butler, dated March 2, 1854	146	396
No. 34—Letter from Charles Butler to W. Goodman, dated March 2, 1860	147	397
No. 35—Letter from W. Goodman to Charles Butler, dated March 19, 1860	148	398

	Original	Print
Exhibit No. 36—Letter from Charles Butler to J. H. Anderson, dated May 7, 1860	149	398
No. 38—Letter from Charles Butler to J. H. Anderson, dated August 9, 1860	149	399
No. 39—Letter from Charles Butler to J. H. Anderson, dated February 1, 1861	149	399
Transcript of record and proceedings in the court of common pleas of Lucas county, Ohio, in the case of the United States Mortgage & Trust Company *vs.* Peter Anderson *et al.*, No. 55794	150	400
Petition	151	400
Answer and cross-petition of defendant Emily O. Butler	155	404
Answer and cross-petition of defendant Rosewell E. Messinger	158	407
Demurrer of defendant Peter Anderson to the petition	165	412
Demurrer to the answer and cross-petition of Emily O. Butler	166	413
Demurrer to answer and cross-petition of Rosewell E. Messinger	167	414
Order overruling demurrers	168	415
Answer of Peter Anderson to the petition	169	416
Amendment to answer of Peter Anderson	173	419
Reply	174	420
Answer of Peter Anderson to cross-petition of Emily O. Butler	176	422
Reply to answer of Peter Anderson to cross-petition	178	424
Judgment	180	426
Amended and supplemental answer and cross-petition of Rosewell E. Messinger	181	427
Answer of Peter Anderson to amended and supplemental answer and cross-petition of Rosewell E. Messinger	191	435
Reply of Rosewell E. Messinger	197	440
Order consolidating causes No. 55794 and No. 55795	202	445
Transcript of record and proceedings in the court of common pleas of Lucas county, Ohio, in the case of The United States Mortgage & Trust Co. *vs.* Rosewell E. Messinger *et al.*, No. 55795	202	445
Petition	203	446
Answer and cross-petition of Emily O. Butler	208	450
Answer and cross-petition of Rosewell E. Messinger	211	453
Order granting leave to defendant Anderson to file answer	217	458
Demurrer of Peter Anderson to the petition	218	459
Demurrer to answer and cross-petition of Emily O. Butler	218	459
Demurrer to answer and cross-petition of Rosewell E. Messinger	219	460
Order overruling demurrers	220	461
Answer of Peter Anderson to the petition	221	462
Amendment to answer of Peter Anderson	225	465
Reply to answer of Peter Anderson	227	467
Answer of Peter Anderson to cross-petition of Emily O. Butler	228	468
Judgment	231	470
Reply to answer of Peter Anderson to the cross-petition	231	471

	Original	Print
Amended and supplemental answer and cross-petition of Rosewell E. Messinger	234	473
Answer of Peter Anderson to amended and supplemental answer and cross-petition of Rosewell E. Messinger	243	481
Reply of Rosewell E. Messinger	250	487
Order consolidating causes No. 55794 and No. 55795	254	490
Decree of May 29, 1907, in cause No. 55794	255	491
Decree of May 29, 1907, in consolidated causes Nos. 55794 and 55795	256	492
Entry submitting causes	257	493
Decree of June 5, 1907, in the consolidated causes Nos. 55794 and 55795	257	494
Transcript of record and proceedings in the circuit court of Lucas county, Ohio, in the case of United States Mortgage & Trust Company *vs.* Peter Anderson *et al.*, No. 2192	267	502
Appeal bond	267	502
Amendment to answer of Peter Anderson to the petition	269	504
Amendment to answer of Peter Anderson to the answer and cross-petition of Emily O. Butler	271	505
Amendment to answer of Peter Anderson to the amended and supplemental answer and cross-petition of Rosewell E. Messinger	273	507
Demurrer of Peter Anderson to the amended and supplemental answer and cross-petition of Rosewell E. Messinger	275	509
Reply of Emily O. Butler to the amendment to answer of Peter Anderson	275	510
Reply of Rosewell E. Messinger to the amendment to answer of Peter Anderson	277	511
Demurrer of plaintiff to the amendment to answer of Peter Anderson	280	514
Decree	281	515
Writ of execution, issued May 6, 1907, in cause No. 55794, in the common pleas court of Lucas county, Ohio	287	519
Deed from James H. Anderson and wife to Charles Butler, dated April 7, 1860	289	521
Deed from Charles Butler and wife to Calvin Bronson, dated April 23, 1860	291	523
Section 13 of stipulation No. 1	293	525
Section 14 of stipulation No. 1	294	526
Section 16 of stipulation No. 1	294	526
Statement of note to Henry Anderson, October 1, 1852	294	527
Note of Charles Butler, dated October 1, 1853	295	527
Deed from P. Anderson and W. Goodman, executors, to Charles Butler, dated April 1, 1855	296	528
Deed from P. W. Lucas, executor, to Charles Butler, dated April 16, 1860	300	531
Deed from city clerk of Toledo to Charles Butler, dated March 26, 1860	303	534
Deed from the city clerk of Toledo to Charles Butler, dated March 26, 1860	304	535
Deed from the city clerk of Toledo to Charles Butler, dated March 26, 1860	306	537

	Original	Print
Deed from the city clerk of Toledo to Charles Butler, dated March 26, 1860	308	539
Deed from the city clerk of Toledo to Charles Butler, dated March 26, 1860	310	541
Deed from the city clerk of Toledo to Charles Butler, dated March 26, 1860	312	543
Deed from the city clerk of Toledo to Charles Butler, dated March 26, 1860	314	545
Deed from the city clerk of Toledo to Charles Butler, dated March 26, 1860	316	547
Letter from Charles Butler to Walter Goodman, dated March 2, 1860	318	549
Letter from Charles Butler to Walter Goodman, dated February 25, 1860	320	551
Contract between Henry Anderson and Charles Butler, dated October 4, 1844	322	552
Sections 1, 2, and 6 of stipulation No. 2	324	554
Exhibit "A" to stipulation—List of written instruments, etc., delivered to Oliver B. Snider, June 1, 1905	326	556
Section 3 of stipulation No. 3	328	558
Stipulation No. 4	328	558
Letter from Charles Butler to Walter Goodman, dated March 19, 1860	330	559
Exhibit "D" to stipulation No. 1—Agreement between Charles Butler and W. Anderson, dated October 10, 1849	332	561
Exhibit "D²" to stipulation No. 1	335	564
Letter from Charles Butler to James H. Anderson, dated July 28, 1858	338	566
Testimony of Oliver B. Snider	341	569
Sections 4, 5, 6, and 7 of stipulation No. 3	343	571
Draft drawn on Charles Butler by James H. Anderson, March 8, 1861, payable to F. R. Farnsworth, treasurer	343	571
Motion for new trial	344	572
Judge's certificate to bill of exceptions	345	573
Order allowing bill of exceptions	345	573
Order granting leave to defendant to file motion to vacate and set aside judgment, etc	346	573
Motion for an order vacating and setting aside the judgment in favor of plaintiff and granting new trial	346	574
Order denying motion to vacate and set aside judgment, etc	347	575
Order allowing bill of exceptions on motion to vacate and set aside judgment, etc	348	576
Bill of exceptions on motion to vacate and set aside judgment, etc	348	576
Exhibit "A" to bill of exceptions—Motion	349	577
Exhibit "B" to bill of exceptions—Judgment of the supreme court of the State of Ohio in case of Peter Anderson *vs.* The United Realty Company *et al.*	351	579
Exhibit "C" to bill of exceptions—Syllabus of the decision of the supreme court of the State of Ohio in case of Peter Anderson *vs.* The United Realty Company *et al*	352	580
Entry of remitter	354	582
Order on application for the valuation of the improvements and assessment of damages, etc	354	582

	Original	Print
Assignment of errors	379	586
Petition for writ of error	380	604
Order allowing writ of error	380	604
Bond on writ of error	381	605
Writ of error	382	606
Citation	383	607
Præcipe for transcript	384	608
Clerk's certificate	385	609
Appearance for plaintiff in error	387	610
Order beginning argument	387	610
Order concluding argument	388	611
Judgment	389	611
Opinion by Lurton, J., June 8, 1909	390	612
Petition for rehearing	411	626
Application for stay of mandate	419	629
Stipulation to stay mandate	422	630
Order denying rehearing and granting stay of mandate	424	630
Writ of *certiorari*	425	631
Return to writ of *certiorari*	426	631

No. 1479.

United States Circuit Court of Appeals

SIXTH CIRCUIT.

PETER ANDERSON, Plaintiff in Error,

vs.

ROSWELL B. MERRIFIELD, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Ohio.

RECORD.

1 TRANSCRIPT OF RECORD. 1

In the United States Circuit Court of Appeals for the Sixth Circuit.

PETER ANDERSON, Plaintiff in Error,
vs.
ROSEWELL E. MESSINGER, Defendant in Error.

Notice.

In the above entitled case now comes the plaintiff in error and indicates and requests that the following parts of the record therein be printed, to-wit:

Omit index.

Omit caption page 1.

Print petition; omit all after verification on petition.

Omit præcipe and endorsement on petition of filing of same.

Omit summons; omit return of Marshal.

Omit defendant's motion for security for costs and endorsements on same.

Print answers; omit endorsements on same.

Omit bond and stipulation for costs, page 8.

Print p. 9; waiver of jury and entries of adjournment.

Omit page 10; adjournments and proceedings.

Print motion for new trial, p. 11.

Print Journal Entry showing judgment for defendant, p. 12.

Print pps. 13–18 inclusive; bill of exceptions.

Print stipulation No. 1, commencing page 18.

Print will of Henry Anderson, exhibit A.

Omit Exhibit B, indenture between Peter Anderson and Walter Butler.

Omit Exhibit C, indenture between Peter W. Lucas and Charles Butler.

Omit Exhibit D, agreement and declaration between Charles Butler and W. Anderson.

Omit Exhibit D 2, declaration of Jas. H. Anderson and memorandum between Charles Butler and James H. Anderson.

Omit Exhibit D 3; indenture between James H. Anderson and Charles Butler.

2 Omit Exhibit E; indenture between Henry Anderson and Charles Butler.

Omit Exhibit F; indenture—Sidney and Edward Bissell.

Omit Exhibit G; agreement between Chas. Butler and Henry Anderson.

Print Stipulation No. 2.

Omit Exhibit A, referred and attached to stipulation No. 2.

Print stipulation No. 3.

Print stipulation No. 4.

Print stipulation No. 5.

Omit Exhibits 42½ to 51, inclusive.
Omit clerk's deeds, No. 9 and 1 to 8 inclusive.
Omit defendant's exhibits Nos. 11 to 14 inclusive.
Omit notice page 111–116, demanding inspection.
Print Journal Entry allowing bill of exceptions, p. 116.
Print petition for writ of error, p. 116.
Print assignment of errors, p. 117.
Print order allowing writ of error, p. 120.
Print writ of error, p. 120.
Print citation, p. 123.
Print order extending time for filing transcript, p. 123-*a*.
Omit bond, p. 124.
Omit certificate, p. 126.
Omit this notice.

PETER ANDERSON,
By RHEA P. CARY,
C. A. THATCHER,
His Attorneys.

TOLEDO, O., *Sept.* 26, 1905.

We, the undersigned attorneys for defendant in error, hereby acknowledge the receipt of a copy of the foregoing notice this the 26th day of September, 1905:

CLAYTON W. EVERETT,
One of Attorneys for Defendants.
O. B. SNIDER,
One of Attorneys for Defendants.
KING & TRACY,
One of Attorneys for Defendants.

1479. In the United States Circuit Court of Appeals for the Sixth Circuit. Peter Anderson, plaintiff in error, vs. Rosewell E. Messinger, defendant in error. Statement by plaintiff in error of parts to be printed. Filed Sept. 27, 1905. Frank O. Loveland, clerk; Rhea P. Cary, of Memphis, Tenn., and Charles A. Thatcher, attorney and counsellor, Gardner Building, Toledo, Ohio.

3 In the United States Circuit Court of Appeals for the Sixth Circuit.

Cause No. 1479.

PETER ANDERSON, Plaintiff in Error,
vs.
ROSEWELL E. MESSINGER, Defendant in Error.

Notice.

Now comes Rosewell E. Messinger, the defendant in error, within one day after receiving from the plaintiff in error his written notice

indicating the parts of the record plaintiff thinks material and necessary to be printed, and herein files his statement in writing indicating the parts of the record he thinks material and necessary to be printed, and requests that the following parts of the record be printed and included in the printed record, namely:

He requests that all of the record be printed, except the following, viz.:

Parts to be omitted from printed record:

1. Index on page 1 of the record.
2. Caption on page 1.
3. Precipe and endorsement on petition of filing of same on page 4.
4. Summons and return of Marshal on page 5.
5. Defendant's motion for security for costs and endorsements on same on page 6.
6. Bond and stipulation for costs on page 8.
7. Adjournments and proceedings of court on page 10.
8. The nine deeds from the Clerk of the city of Toledo, Ohio, to Charles Butler on pages 88 to 104 inclusive of the record.
9. Bond on page 124.
10. Certificate on page 126.
11. Notice of plaintiff in error upon defendant in error of what parts of the record he deems material to be printed.
12. This notice from the defendant in error.

All the above specifically mentioned parts Nos. 1 to 12 inclusive of the record can be omitted from the published record; but all the balance of the record we deem material to be printed and request that the same be printed.

CLAYTON W. EVERETT,
KING & TRACY,
O. B. SNIDER,
Attorneys for Defendant, Rosewell E. Messinger.

Sept. 27th, 1905.

4 Received from C. W. Everett, one of the attorneys for the defendant, a copy of the foregoing on this 27th day of September, 1905.

RHEA P. CARY,
C. A. THATCHER,
Attorneys for Plaintiff.

To the Honorable Frank O. Loveland, Clerk of the Circuit Court of Appeals, Sixth Circuit, Cincinnati, O.

No. 1479. In the United States Circuit Court of Appeals for the Sixth Circuit. Peter Anderson, plaintiff in error, vs. Rosewell E. Messinger, defendant in error. Statement of parts of record to — printed by defendant filed Sept. 29, 1905. Frank O. Loveland, clerk, and Clayton W. Everett, attorney for defendant in error.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL MESSENGER, Defendant.

Petition.

Plaintiff says that he is a citizen and resident of the State of Tennessee, and the defendant is a citizen and resident of the County of Lucas, State of Ohio.

That this action is brought to recover possession of real estate situated in Lucas County, Ohio, the value of which exceeds, exclusive of costs, the sum of one hundred thousand ($100,000) dollars, and to recover damages amounting to ten thousand ($10,000.00) dollars.

First.

For a first cause of action against the defendant, plaintiff says that he has a legal estate in, is the owner in fee simple of, and is entitled to the immediate possession of the following described real estate, to-wit:

Lots numbered twenty (20), twenty-one (21), except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof, thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), ten hundred and eight (1008), and ten hundred and nine (1009), all in the Vistula Division of the City of Toledo, County of Lucas, State of Ohio.

That said lots exceed $100,000.00 in value.

That the defendant unlawfully keeps the plaintiff out of the possession of said premises.

Second.

For a second cause of action against the defendant, plaintiff says that he is a citizen and resident of the state of Tennessee, and that the defendant is a citizen and resident of the County of Lucas, State of Ohio.

That since the sixteenth day of September, 1902, the plaintiff has had a legal estate in, has been the owner in fee simple of and is entitled to the use and possession of the following described real estate to-wit:

Lots numbered twenty (20), twenty-one (21), except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof, thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), ten hundred and eight (1008), and ten hundred and nine (1009), all in the Vistula Division of the City of Toledo, County of Lucas, and State of Ohio.

That the defendant has been wrongfully keeping plaintiff out of the possession of said real estate, and has received the rents, issues and profits therefrom since the said 16th day of September, 1902. That by reason thereof, plaintiff has lost said rents and profits and has sustained damages by reason of the unlawful withholding of the possession of said property from plaintiff during said time, all of which is of the value and damage to plaintiff in the sum of ten thousand ($10,000.00) dollars.

Wherefore, plaintiff prays for judgment against the said defendant for the recovery of the possession of said premises, and also for said sum of $10,000.00, with interest thereon, and also for any rents and profits or damages which may accrue subsequently to the filing of this action, up to and including the time that judgment may be entered in favor of plaintiff. Plaintiff prays for costs and all other relief to which he may be entitled.

PETER ANDERSON,
By CHAS. A. THATCHER,
RHEA P. CARY,
His Attorneys.

STATE OF TENNESSEE,
Shelby County, ss:

Peter Anderson, being first duly sworn, says that he is the
6 plaintiff in the above entitled action; that the allegations contained in the foregoing petition are true as he verily believes.

PETER ANDERSON.

Subscribed in my presence and sworn to before me this the 24th day of December, A. D., 1904.

[SEAL.]

M. W. ALLEN,
Notary Public, Shelby County, Tennessee.

In the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

Law. Cause No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL MESSENGER, Defendant.

Answer.

The defendant, Rosewell Messenger for his answer to plaintiff's petition and by way of first defense thereto says:

First Defense.

He admits that the plaintiff is a resident and citizen of the State of Tennessee; that this defendant is a citizen and resident of the

County of Lucas of the State of Ohio; that this action is brought to recover possession of real estate situated in Lucas County, Ohio, the value of which exceeds, exclusive of costs, the sum of one hundred thousand ($100,000.00) dollars, and to recover alleged damages amounting to ten thousand ($10,000), dollars:

That this defendant is in the possession and is now and has been keeping plaintiff out of the possession of the real estate described in plaintiff's petition, and has received the rents issued and profits therefrom since the 6th day of September, A. D., 1902; but while admitting said allegations to be true this defendant denies each and all the other allegations contained in plaintiff's petition.

He specially denies that the plaintiff has a legal estate or any other title in the said real estate, or any part thereof.

7 He denies that the plaintiff is the owner in fee simple or otherwise of said real estate, and he denies that the plaintiff is entitled to the possession of said real estate or any part thereof.

KING & TRACY,
CLAYTON W. EVERETT,
Attorneys for Defendant.

STATE OF OHIO,
Lucas County, ss:

The defendant, Rosewell Messenger, being first duly sworn says that the allegations contained in the foregoing answer are true as he verily believes.

ROSEWELL E. MESSENGER.

Sworn to before me and subscribed in my presence this 20th day of January, A. D., 1905.

WM. B. DUCK,
Notary Public, Lucas County, Ohio.

December term, A. D., 1904, to-wit: April 29, 1905.
Present the Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL MESSENGER.

This cause is continued to the next term of this court.

United States Circuit Court, Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON
vs.
ROSEWELL MESSENGER.

In this cause the plaintiff and defendant, by their attorneys,
8 agree that the same may be heard and determined by the

court without the intervention of a jury; hereby waiving the same.

PETER ANDERSON,
By C. A. THATCHER AND
R. P. CARY, *Attys.*
ROSEWELL MESSENGER,
By KING & TRACY,
C. W. EVERETT & O. B. SNIDER,
His Attorneys.

(Endorsements.) No. 1897. U. S. Circuit Court, Northern Dist. of Ohio, Western Division. Peter Anderson, vs. Rosewell Messenger. Stipulation waiving jury. Filed June 17, 1905, Irvin Belford, Clerk, U. S. Circuit Court, N. D. O.

June term, A. D., 1905, to-wit: June 17, 1905.

Present the Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL MESSENGER.

This cause now coming on for hearing and a jury having been waived, was submitted to the court upon the pleadings and the evidence. And the court having heard a part of the evidence and the hour of adjournment having arrived the court continued the hearing of said cause until Monday afternoon at 4 o'clock.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Motion for New Trial.

9 Now comes the plaintiff and moves the court to vacate and set aside his decision, findings, order, judgment, and decree made and entered in this case, and grant a new trial thereof for the following named reasons, to-wit:

1. The court erred in admitting evidence offered by the defendant over the objections of plaintiff, to which action of the court plaintiff duly excepted.

2. The decision, findings, order, judgment and decree of the court are not sustained by sufficient evidence.

3. The decision, findings, order, judgment and decree of the court are contrary to law.

4. The decision, findings, order, judgment and decree of the court are contrary to the weight of the evidence.

5. The decision, findings, order, judgment and decree of the court should have been for the plaintiff instead of for the defendant.

6. Error of law occurring at the trial and duly excepted to by the plaintiff.

PETER ANDERSON,
By CHAS. A. THATCHER,
R. P. CARY,
His Attorneys.

(Endorsements:) No. 1897. U. S. Circuit Court, Northern Dist. of Ohio, Western Division. Peter Anderson, plaintiff, vs. Rosewell E. Messenger, defendant. Motion for New Trial. Filed, June 22, 1905, Irvin Belford, Clerk, U. S. Circuit Court, N. D. O.

June Term, A. D., 1905, to-wit, June 28, 1905.

Present the Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL MESSENGER.

This day came the parties to this action by their respective attorneys, the plaintiff, Peter Anderson, by Messrs. Rhea P. Cary and Charles A. Thatcher, his attorneys, and the defendant, Rosewell E. Messenger, by Messrs. King & Tracy, Clayton W. Everett and Oliver B. Snider, his attorneys, and thereupon this cause coming on for trial the parties in open court and by written stipulation
10 signed by the parties and filed in this case, waived the intervention of a jury and consented that this cause be tried by the court without a jury, and thereupon this cause came on before the court for trial upon the issues joined in the pleadings, the evidence offered by the parties and was argued by counsel, and the court, being fully advised in the premises, does find the issues of the cause with the defendant, Rosewell E. Messenger, and against the plaintiff, Peter Anderson, to which finding and order of the court the plaintiff then and there in open court duly excepted.

Thereupon this cause came further on for hearing before the court, upon the written motion for a new trial, filed by the plaintiff in this action on the grounds therein stated, and the court, being fully advised in the premises, does overrule and disallow said motion, to which action of the court in overruling said motion the plaintiff then and there in open court duly excepted.

Whereupon it is ordered and adjudged by the court that plaintiff's petition be, and is hereby, dismissed at his costs, and that the defendant, Rosewell E. Messenger, go hence without date and recover his costs herein taxed at $— and that execution issue, and that the

plaintiff pay the costs made by him taxed at $ — and that execution issue. To all of which action and orders of the court in dismissing plaintiff's petition and rendering judgment against plaintiff, the said plaintiff then and there in open court duly excepted.

Thereupon the court allows the plaintiff ninety (90) days from the filing of this entry for the preparation, signing, allowance and filing of the bill of exceptions herein.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Plaintiff's Bill of Exceptions.

Be it remembered, That on the trial of the above entitled cause in the Circuit Court of the United States for the Northern District of Ohio, Western Division, at the June term thereof, A. D., 1905, before the Honorable Robert W. Tayler, Judge thereof, a jury being duly waived, the following proceedings were had, viz.:

11

The plaintiff, to maintain the issues upon his part, offered and read in evidence the first eight sections in stipulation No. 1, hereto attached and made a part hereof, and also the will of Henry Anderson, marked Exhibit A, attached to said stipulation No. 1. Plaintiff offered and read in evidence stipulation No. 5, hereto attached, and made a part hereof.

Plaintiff further offered and read in evidence the eighth section of stipulation No. 3, hereto attached and made a part hereof.

Thereupon plaintiff rested.

The defendant thereupon, to maintain the issues upon his part, offered the following in evidence, to which the plaintiff objected at the time of the offering of each document and paper separately on the ground that each of said documents and papers was incompetent, immaterial and irrelevant.

Thereupon the court, when each of said objections was made by the plaintiff separately to each of said documents and papers and evidence and parts of evidence made by plaintiff, overruled said objections, to which action of the court plaintiff did except at each time when said objection was overruled, and the court did receive in evidence each of said documents and papers under the exception of plaintiff then and there duly taken.

Said evidence offered by the defendant, and each part thereof, thereupon received by the court, to which plaintiff duly excepted, and is in the following words and figures, to-wit, and is attached to and made a part hereof:

Section nine of stipulation No. 1 hereto attached and made a part hereof.

Deed from the executors of Henry Anderson to Charles Butler, being Exhibit B to paragraph nine of said stipulation No. 1.

Section ten of said stipulation No. 1.

Exhibit C referred to in section ten of stipulation No. 1 and attached to said stipulation No. 1.

Section eleven of stipulation No. 1.

Exhibit D referred to in section eleven of stipulation No. one, and attached thereto.

Section twelve of stipulation No. one.

Exhibit D-2 referred to in section twelve of stipulation No. one and contained therein.

Exhibit D-3 referred to in section twelve of stipulation No. one, and contained therein.

12 Sections thirteen, fourteen, fifteen, sixteen, seventeen, eighteen of stipulation No. one.

Exhibit F referred to in section fifteen of stipulation No. one and attached thereto.

Exhibit G referred to in section seventeen of stipulation No. one and attached thereto.

Contract dated October 4th, 1841, between Henry Anderson and Charles Butler, marked Exhibit E, and made a part of stipulation No. 1.

Paper marked stipulation No. four, dated May 13, 1905.

Sections one, two, three, four and five of stipulation No. two, hereto attached and made a part hereof.

Exhibit A to stipulation No. two.

It was admitted by both parties in open court, but the plaintiff objected to the competency, relevancy and materiality of the same, which objection was overruled by the court, and to which plaintiff duly excepted, that the annual accounts and reports of the executors of the will and trustees of the estate of Henry Anderson, filed in the Probate Court of Marshall County, Mississippi, show the following payments by Charles Butler to said executors and trustees upon the $20,000.00 note, dated July 1, 1841, executed by Charles Butler to Henry Anderson:

Oct. 10, 1849, paid 5th report	$3,376.52
Oct. 10, 1849, paid 5th report	2,700.00
Oct. 1, 1851, paid 6th report	1,110.00
Oct. 1, 1852, credit by commission, 7th report	5,967.49
Oct. 1, 1852, by interest on same, 7th report	1,551.42
Oct. 1, 1852, 7th report	2,000.00
Oct. 1, 1852, 7th report	1,669.96
May 4, 1855, 9th report	3,000.00
Oct. 30, 1855, paid on principal, 10th report	4,340.00
Oct. 30, 1855, paid interest, 10th report	1,027.60

The defendant also offered under the objection of plaintiff on the ground that the same was incompetent, irrelevant and immaterial, the following papers, to which objection was made by plaintiff separately at the same time the same was offered, and said objections were overruled by the court and received in evidence under plaintiff's exception, the following:

A paper showing an account stated which is marked defendant's exhibit No. 8.

Receipt marked defendant's exhibit No. nine.

Receipt marked defendant's exhibit No. ten.

13 Receipt marked defendant's exhibit No. eleven.

Receipt marked defendant's exhibit No. twelve.

Paper marked defendant's exhibit No. thirteen.

Paper marked stipulation No. three, excepting that part relating to letter written by Mr. Butler.

Paper marked defendant's exhibit No. fourteen.

Letters marked Nos 42½, 43, 44, 45, 46, 48, 49, 50, 51, referred to in exhibit A to stipulation No. 2.

Deed of city clerk of Toledo to Charles Butler, hereto attached marked "clerk's deed No. one."

Deed of city clerk of Toledo to Charles Butler, hereto attached marked "clerk's deed No. 2."

Deed of city clerk of Toledo to Charles Butler, hereto attached marked "Clerk's Deed No. 3."

Deed of city clerk of Toledo to Charles Butler, hereto attached marked "Clerk's Deed No. 4."

Deed of city clerk of Toledo to Charles Butler, hereto attached marked "Clerk's Deed No. 5."

Deed of city clerk of Toledo to Charles Butler, hereto attached marked "Clerk's Deed No. 6."

Deed of city clerk of Toledo to Charles Butler, hereto attached marked "Clerk's Deed No. 7."

Deed of city clerk of Toledo to Charles Butler, hereto attached marked "Clerk's Deed No. 8."

Deed of city clerk of Toledo to Charles Butler, hereto attached marked "Clerk's Deed No. 9."

Notice served on plaintiff's counsel to produce instrument dated May 2nd, 1905, hereto attached, marked "Notice."

Stipulation No 3, hereto attached, marked "Stipulation No. three.

At the time each of the foregoing papers and exhibits or parts thereof were offered in evidence, the plaintiff objected to the introduction of each of the same, separately at the time each was so offered, on the ground that the same were incompetent, immaterial and irrelevant, but the court in each instance overruled said objection, to which action of the court plaintiff at each of said times duly excepted.

Thereupon defendant rested

Further to maintain the issues on his part, plaintiff offered and read in evidence in rebuttal section 6 of stipulation No. 2, and section 3 of stipulation No. 3, each of which is hereto attached and made a part hereof.

The foregoing, together with the several exhibits, stipulations and papers hereto attached which were offered and received in

14 evidence and are made a part hereof, comprises all of the evidence given or offered by either party on the trial of this case.

Thereupon the defendant, at the close of the evidence by his counsel, moved the court to return a judgment in favor of the defendant,

which motion the court sustained, to which ruling of the court the plaintiff then and there duly excepted.

Thereupon and within the time allowed by law, to-wit, on the 22nd day of June, 1905, plaintiff moved in writing for a new trial on the several grounds set forth in said motion. After consideration of said motion, the court did on the 28th day of June, 1905, overrule the same, to which action of the court plaintiff then and there duly excepted.

Thereupon the plaintiff tenders this his bill of exceptions to the action of the court in the various particulars therein set out which is signed in open court, sealed and made a part of the record in this case the 27th day of June, 1905.

ROBERT W. TAYLER,
Trial Judge.

In the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

Cause No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL MESSINGER, Defendant.

Stipulation No. 1.

In the above entitled cause it is agreed by both parties that the following facts are true, namely:

1st. That on the 19th day of May, A. D., 1838, at the time of the execution of the mortgage, hereinafter mentioned on the land involved in this case by Edward Bissell and his wife, Jane A. M. Bissell, of the city of Toledo, Ohio, to Charles Butler, of the city and State of New York, that the said Edward Bissell was the owner in fee simple, had the legal title to and was entitled to and in the actual possession of the real estate described in said mortgage, including all of the real estate involved in this action and at the time of the execution of said mortgage there was and now is a
15 regularly executed chain of conveyances in fee simple for said real estate from the Government of the United States down to the said Edward Bissell.

2nd. That on the 19th day of May, A. D., 1838, said Edward Bissell and Jane A. M. Bissell, of the city of Toledo, Ohio, signed, sealed, executed, acknowledged and delivered in due form of law to Charles Butler, of New York City, their mortgage deed of said date when and whereby they did duly grant, bargain, sell and convey to the said Charles Butler, his heirs and assigns forever in fee simple, among other lots and parcels of land, all of the real estate involved in this action to secure the payment of the bond of said Edward Bissell to the said Charles Butler executed on the same date for $21,500.00, payable at the office of the Manhattan Company of the city of New York, within one year from the date of said mortgage, with interest at the rate of seven per cent. per annum, which mort-

gage was attested by two witnesses and was duly acknowledged according to law, which mortgage was afterwards duly filed for record May 19th, 1838, and recorded by the recorder of Lucas County, Ohio, on June 7th, 1838, on pages 267 and 269 inclusive of Volume No. 2 of the public record of mortgages kept and recorded in the recorder's office of Lucas County, Ohio.

That afterwards on September 23rd, A. D., 1841, the said Charles Butler made an assignment of said mortgage to said Henry Anderson in the words and figures following to-wit, viz.:

"Assignment: I hereby assign this mortgage to Henry Anderson on certain trusts set forth in a deed this day made.

September 23rd, 1841.

CHARLES BUTLER."

which assignment was duly recorded on the margin of the record of said mortgage, in Lucas County, Ohio, on September 30th, A. D. 1843.

3rd. That on the 19th day of September, A. D., 1843 said Henry Anderson claiming to be the assignee of said mortgage executed by said Edward Bissell and wife to said Butler filed his bill in Chancery in the Court of Common Pleas of Lucas County, Ohio, on the Chancery side of said Court to foreclose the aforesaid mortgage; the said Henry Anderson was complainant in said action and Edward Bissell, Jane A. M. Bissell, Frederick Bissell, Sidney Bissell and Charles Butler were named as defendants in said bill; that said Henry Anderson by his said bill alleged and set forth the execution by said Edward Bissell and Jane A. M. Bissell, his wife, of the said bond and mortgage, and the non-payment thereof, and said bill in
16 no way made any allegations against the said Charles Butler, except to allege the assignment of said mortgage by the said Charles Butler to the said Henry Anderson, in words and figures as follows:

"Your orator further represents that on the 23rd day of September in the year of our Lord 1841, the said mortgage and bond was duly transferred and assigned to your orator by the said Charles Butler."

The only prayer or relief asked for in said bill is in the words and figures following, to-wit, viz.:

"Your orator therefore, prays that the Writ of Subpœna may issue against the said Edward Bissell, Jane A. M. Bissell, Charles Butler, Frederick Bissell and Laverett Bissell that they may be compelled to answer all and singular the premises, that an account may be taken of what is due to your Orator for his principal and interest aforesaid; that said Frederick Bissell, Sidney Bissell, Charles Butler, Jane A. M. Bissell may be forever barred and foreclosed of and from all right and equity of in and to said mortgaged premises and that your Orator may have such other and further relief in the premises as equity and good conscience may require."

That all the defendants in said action, except Charles Butler, were either duly served with subpœna or entered their appearance in said action, but the said Charles Butler was not served with subpœna or other process, and in no manner entered his appearance in said

action, and the said Court in said action in no manner acquired jurisdiction over said Charles Butler; that afterwards on the first day of April in the year, A. D. 1844, a decree was duly entered in said action ordering the said premises to be advertised and sold according to law for the payment of the $29,139.01 found due the complainant Henry Anderson on said bond and mortgage from the defendant Edward Bissell; and one Edson Allen, Master Commissioner in Chancery in said Court, was appointed to sell said premises, and that afterwards the said Master Commissioner in pursuance of the decree of the Court in said action sold the real estate involved in said action including all the real estate involved in this action to the complainant Henry Anderson at the price of $6,921.00, which sale was afterwards duly confirmed by the Court and the said Edson Allen as said Master Commissioner making said sale was ordered by said Court to convey said real estate in fee simple to the said purchaser, Henry Anderson, his heirs and assigns forever, and that afterwards on the 18th day of November, 1844, the said Edson
17 Allen as such Master Commissioner in pursuance of the decree rendered in said action of said sale and the confirmation thereof and in pursuance of the order of said Court, did execute his Master Commissioner's deed to the said Henry Anderson dated the 18th day of November, 1844, whereby the said Master Commissioner conveyed to the said Henry Anderson, his heirs and assigns forever all the real estate involved in said action and all the real estate involved in this action, which deed was afterwards duly filed for record with the Recorder of Lucas County, Ohio, and by him duly recorded on page 168 of Volume 10 of the public record of deeds, kept in the Recorder's Office of Lucas County, Ohio.

That all the proceedings in said foreclosure suit were regular and legal, excepting the failure or omission to serve said Charles Butler with subpœna, or in some manner acquire jurisdiction as to him, which plaintiff does not admit to have been necessary.

That the foregoing stipulation in this the 3rd paragraph hereof, regarding the recitals in the pleadings and other proceedings, is subject to verification by the production by the defendant of duly certified copies of the record in said cause, unless the same is hereafter waived on the margin hereof by counsel for plaintiff.

That the sale of said real estate by Edson Allen, Master in Chancery, as aforesaid, to Henry Anderson, was on the 24th day of September, A. D. 1844. That after said sale the said Henry Anderson and Charles Butler entered into a written contract, a copy of which is hereto attached, marked "Exhibit E," and made part hereof.

4th. That Henry Anderson at the time of his death was a resident of Holly Springs, Marshall County, of the State of Mississippi; that said Henry Anderson made and executed his last will and testament, dated the 28th day of February, A. D. 1846, and afterwards on the 3rd day of April of said year, died, after which his said last will and testament was duly probated in and by the Probate Court of Marshall County, Mississippi, which said Court by the laws of the State of Mississippi had jurisdiction to probate said will, which afterwards was recorded in said Probate Court as the last will and testament of the said Henry Anderson, deceased, and that after-

wards a duly authenticated copy of said last will and testament with the proceedings admitting it to probate and record taken from the records of said Probate Court of Marshall County, Mississippi, was filed in the Probate Court of Lucas County, Ohio, and by it was duly admitted to probate and record, as a will from another State,
18 and then and thereby became and now is the last will and testament of the said Henry Anderson, deceased, and is in full force and effect; a true, full and correct copy of said will is hereto attached marked "Exhibit A," and hereby made a part hereof.

5th. That the said Henry Anderson upon his death left surviving him his two sons, his only heirs at law, to-wit, William Anderson, who was born February 12, 1828, and James H. Anderson, who was born June 25, 1831; that said William Anderson died intestate January, A. D. 1850, unmarried and without issue.

6th. That said James H. Anderson, surviving son of Henry Anderson, died intestate at the city of Memphis in the State of Tennessee, on September 16, A. D. 1902, leaving surviving as his only child and only heir at law, the plaintiff, Peter Anderson, who was born August 27, 1859, and who is the grandson and only grandchild and only living descendent of the said Henry Anderson, deceased.

7th. That the property described in plaintiff's petition and involved in this action is now and was at the commencement of this action worth over $100,000.00, and that the defendant Rosewell Messinger is now and ever since the 16th day of September, 1902, has been in the actual possession of said real estate, and during all of said time has received the rents, issues and profits thereof, and at all times since said date has refused and still refuses to surrender said real estate to plaintiff or to account to him for said rents, issues and profits or any part thereof.

8th. That at the commencement of this action the plaintiff, Peter Anderson was and now is and all the time since has remained a resident and citizen of the city of Memphis of the State of Tennessee and of no other city or State, and this defendant, Rosewell Messinger at the commencement of this action was a resident and citizen of Lucas County, Ohio, and at all of said times has remained and now is a resident and citizen of said county and State, all as stated in plaintiff's petition filed herein.

9th. That Peter Anderson and Walter Goodman of Holly Springs, Mississippi, two of the Executors of the will and Trustees of the estate of Henry Anderson, deceased, executed a deed purporting to convey to said Charles Butler, all the real estate involved in this action, which deed was duly signed, sealed, acknowledged and executed by said Peter Anderson and Walter Goodman as said Executors and Trustees according to the laws of the State of Ohio, in the presence of two witnesses, who signed as such and said deed was dated October 1st, 1855, but was not delivered until about
19 the first of May, 1860, and was recorded on May 2nd, 1860, on page 110 of Volume 34 of the record of deeds of Lucas County, Ohio; a copy of said deed is hereto attached and marked "Exhibit B," and hereby made a part hereof.

The foregoing statement as to delivery of said deed, shall not preclude defendant from offering proof as to facts which may establish a conditional or other earlier delivery of said instrument, subject however to provisions of paragraph 18 hereof. That said Peter Anderson was a brother of Henry Anderson, deceased, and is not the plaintiff, although having the same name.

10th. That Peter W. Lucas, one of the Executors of the will and Trustees of the estate of Henry Anderson, deceased, executed a deed, purporting to convey to said Charles Butler, all the real estate involved in this action, which deed was duly signed, sealed, acknowledged and executed by said Peter W. Lucas, as said Executor and Trustee according to the laws of the State of Ohio in the presence of two witnesses who signed as such, was dated the 16th day of April, 1860, was delivered on or about May 1st, 1860, and was received for record May 2nd, 1860, and was recorded May 3rd, 1860, on page 112, of Volume 24 of the record of deeds of Lucas County, Ohio, a true, full and correct copy of which deed is hereto attached marked "Exhibit C," and hereby made a part hereof.

11th. That on or about October 10th, 1849, said William Anderson, of Holly Springs, Mississippi, one of said sons of Henry Anderson, deceased, and the uncle of plaintiff, duly executed a certain agreement in writing relating to the real estate involved in this action and declaring the interest of said William Anderson therein as heir at law of said Henry Anderson, deceased, held in trust as security for the payment of a certain note given by Charles Butler and described in said agreement; and that said agreement of October 10th, 1849, was also duly executed by Charles Butler and attested by S. H. Fleetwood, a full and true copy of said agreement being hereto attached marked "Exhibit D," and hereby made part hereof.

12th. That on or about September 16th, 1851, said James H. Anderson, of Holly Springs, Mississippi, the then only surviving son of Henry Anderson, deceased, and the father of plaintiff, executed, acknowledged and delivered a certain written contract to said Charles Butler, bearing said date, and relating to the real estate in controversy in this cause, a full and true copy of said agreement and the official acknowledgements thereof being hereto attached and marked "Exhibit D 2," and hereby made part hereof.

That on or about the 7th day of April, 1869, James H. Anderson of Holly Springs, in the State of Mississippi, the then surviving son of Henry Anderson, deceased, and the father of plaintiff, executed a quit claim deed purporting to convey to the said Charles Butler all the real estate involved in this action, which said deed was duly signed, sealed, acknowledged and executed by the said James H. Anderson, in the presence of two witnesses who signed said deed as such, which deed was received for record May 2, 1860, and was duly recorded in Lucas County, Ohio, on May 3rd, 1860; a true, full and correct copy of said deed is hereto attached marked "Exhibit D," and hereby made a part hereof.

13th. That on the 23rd day of April, A. D. 1860, said Charles Butler of the city and State of New York, in consideration of seven-

teen thousand five hundred dollars ($17,500.00) paid by Calvin Bronson, of Toledo, Ohio, to said Butler, signed, sealed, acknowledged and delivered a warranty deed to said Bronson, and by it did duly grant, bargain, sell and convey, so far as he was able to said Calvin Bronson, his heirs and assigns forever, all of the real estate involved in this action, and that there is a regularly executed chain of conveyances and transfers from the said Calvin Bronson down to the defendant Rosewell Messenger, and that all the right, title and interest of the said Calvin Bronson in his life time in any way acquired in or to the real estate involved in this action was at the commencement of this action held and is now held and owned by the defendant, the said Rosewell Messinger, the grandson of said Bronson.

14th. That after the said Calvin Bronson received his said deed from said Charles Butler, and in the month of June, A. D. 1860, he entered upon the real estate involved in this action claiming under his said deed, and in the month of June, 1860, commenced the erection of a tobacco factory on said premises and erected thereon large and valuable buildings, which are now on said premises, and that the defendant, Rosewell Messinger, the grandson of said Calvin Bronson, after the death of his grandfather erected other large and expensive buildings, all of which are now on said premises.

15th. That on March 13, 1843, said Edward Bissell and Jane A. M. Bissell, his wife, of Toledo, Ohio, and Sidney Bissell of the same place, made, executed, acknowledged and delivered their quit
21 claim deed dated February 22, 1843, to Charles Butler of New York City, of all the real estate involved in this action, which deed was attested by two witnesses, who signed as such and was duly filed for record October 11, 1849, and recorded on October 13, 1849, on page 146 of Volume 16 of the public records of deeds and recorded in the Recorder's Office of Lucas County, Ohio, a true, full, and correct copy of said deed is hereto attached marked "Exhibit F," and hereby made part hereof.

16th. That the said defendant Rosewell Messinger, and his grandfather Calvin Bronson, under whom he claims, have been in the open, notorious and continued possession of all of said premises since the first day of June, A. D. 1860, claiming said premises under said deed to the said Calvin Bronson from the said Charles Butler, and that said Calvin Bronson and defendant Messinger have paid the taxes and assessments levied on said premises ever since and including the year A. D. 1860.

17th. That on or about September 21, 1841, said Charles Butler and said Henry Anderson duly executed a written agreement, bearing said date and relating to the division between them of certain commissions arising out of real estate transactions, a full and true copy of which agreement is hereto attached, marked "Exhibit G," and is hereby made part hereof.

18th. The foregoing statement of facts or any part thereof may be used and read in evidence at the trial of this action by either party in lieu of the proofs of the matters herein stated, with the same force and effect that the proof of said facts would have were the same offered and proven in open Court in the regular and ordi-

nary way, and subject to any and all objections and exceptions as to competency, relevancy and materiality, that might be made against such proof and facts were they offered in the regular way in open Court. The said parties are at liberty to offer additional proofs of the foregoing or other facts in this action in support of their respective titles, subject to the same objections and exceptions.

In witness whereof the parties do hereunto sign their names to duplicates hereof on the 1st day of June, A. D. 1905.

PETER ANDERSON.
By RHEA P. CARY, *Attorney;*
ROSEWELL E. MESSINGER.
By CLAYTON W. EVERETT,
KING AND TRACY, AND
O. B. SNIDER.

His Attorneys.

22 "EXHIBIT A."

I, Henry Anderson, do make and ordain this to be my last will and testament. I declare my domicil to be the town of Holly Springs, Marshall County, State of Mississippi. I revoke the will made by me on the 3rd of March, 1837, and all other wills, if any there be.

Item. I give, devise and bequeath to Peter Anderson, Walter Goodman and Peter W. Lucas all my property both real and personal, legal and equitable in possession reversion or remainder, and all claims and demands whatsoever, except such right, title or claim to land, money or choses in action as I may be entitled to as one of the agents of the American Land Company and as one of the stockholders of said Company; this property they shall hold in trust and if one or more of them die, the survivors or survivor shall hold in trust for the following purposes; they shall pay my debts, other than such as may be owing to the American Land Company, out of moneys on hand and such property as may be sold least injurious to my estate. I wish them to collect debts due to me, and apply to this purpose. They may, if they think fit, and can, obtain an extension of time on any debt, and they may pledge my property to raise money to pay debts. They may sell for cash or on credit, and if at any time, they have funds on hand not required for debts or legacies they may invest the same. They shall have full power to make titles for property sold and to pay charges for preservation and in all respect have the power of owners but always as trustees. I have entire confidence in each of them and therefore I give each the power of all, so that each may do separately what all acting together may do, except in making investments; in that I wish all to join. The annual accounts of my said trustees signed by their respective names shall be binding on my heirs and shall be conclusively so unless error or fraud be clearly established. I have directed the payment of debts, other than what I may owe the American Land Company. I exclude the debts to the Company because that is subject to an account with the Company and I do not wish

my trustees to make payments before that account is adjusted. The adjustment of that account, and the direction and management of the affairs of the company so far as I have power, right or interest, I place in the hands of Peter Anderson and Walter Goodman and when they have finally closed it, it shall become a part of the trust created by this article of my will and subject to the control
23 of my said trustees. By saying "it shall become a part of the trust" I mean the effects and proceeds that I may be entitled to as stockholder and agent of the Company.

Item. As agent of the American Land Company jointly with my brother I am entitled to an account with the Trustees, and it is my will that this claim for an account, and all rights, claims and powers growing out of any contract or contracts with the Trustees do vest in Peter Anderson and Walter Goodman as I have before said. They shall have power to settle with the Trustees immediately or at such time as they may think best, and they shall be entitled to receive conveyances of land, should a division of land take place, and should the notes of the company be divided, they shall be entitled to receive the same. The lands they may receive shall be taken to them as trustees of this my will. They shall have power to execute all papers necessary for a settlement of the agency and all papers executed by them shall be binding on my heirs. When this business is finally closed I direct that they make out and sign a schedule of the property received on account of said interest and an account explanatory of the settlement, and the same shall be taken as a proper inventory and the property therein contained shall thereafter become vested in my Trustees created by the first clause of my will, but if there be real estate therein contained, and the same stand in their name, as Trustees, that is in the name of Peter Anderson and Walter Goodman as above stated, a title from them shall be good and sufficient to a purchaser. My intention being that this interest shall only come under the administration of the Trustees first created and my executors hereinafter named, from and after the time such interest is ascertained by a final close with the company. I have acted as agent for the Trustees of the American Land Company in respect to the lands of the Company in the State of Arkansas and elsewhere. What may be due me for such service is a claim that I desire to go to the said Peter & Walter and not to my trustee first named. It forms a portion of my claims against the Company which I wish settled on the final settlement with them. I suppose I have made myself fully understood, but for greater certainty I repeat that my wish is that nothing be taken from the company—interest for debts or legacies unless for such debts as are connected with the company. At the same time if my other property can not pay my debts or can not pay them without injury, and it be found that it would not be unjust to withdraw funds from the company interest,
24 then it may be done, not otherwise. When my interest in the company is finally ascertained it shall, as I have said, become a part of the trust first created, and the said Peter W. Lucas shall indorse his acceptance of the schedule of the two Trustees who have signed it. I give to each, that is, to Peter Anderson and Walter Goodman severally the same powers that both are invested with. In

both of the trusts created by this will my trustees shall not be required to give security, nor shall they be liable for each other and their accounts signed by them respectively shall be evidence binding on my heirs of the correctness unless error or fraud be clearly shown.

Item. It is my will that when my son William arrives at the age of twenty-one years the trustees of the first and general trust shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one-half of my property reserving thereout two-fifth parts of said moiety, by valuation which my said Trustees shall hold in trust and properly invest and pay over to him at the age of twenty-five years. If my interest in the American Land Company be not brought into the general trust at the time William becomes twenty-one, but is brought in any time before he arrives at twenty-five, so soon as brought in, two-fifths shall be deducted therefrom, and invested and paid over to him at twenty-five the other three-fifths he shall have as soon as paid in. I find the above does not express my will in this: when I say two-fifths shall be deducted from the interest I may have in the Land Company for investment, and three-fifths to be paid to him, I mean two-fifths of a moiety shall be deducted and three-fifths of a moiety paid over.

And it is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective period of twenty-one and twenty-five years of age being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the regulations laid down concerning the same.

If either of my sons die without lineal descendants the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants then one-half both of the decedents original portion as well as one-half of the portion taken by survivorship shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such
25 surviving son. If my brother Peter, be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving then the share shall go to my other brother and sisters surviving at the time of such decease of my son. I make the following explanation: The limitations over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years respectively. The above limitations over shall give way to the provision of such wills.

Item. I entered into a contract with the American Land Company to warrantee title to such lands of the company as might be sold, and it so is that many title bonds are now out binding me to such warrantees. I give to Peter Anderson and Walter Goodman or either of them the power to execute deeds to carry out such warran-

tees, and I declare that the name of either with the seal of either to such deeds shall bind my heirs, executors and administrators. It is also the case that I hold lands in common with Daniel Saffarrans. It is important that these lands be sold as purchasers may offer. My undivided half interest has already by this my will been devised to my general trustees. I declare that they or either of them shall have the power to convey with warrantee. This power I presume they have by the first clause of my will, which vests the title in them. I only mention it here for greater certainty.

Item. If my brother Peter desires to keep up a household in this place, I bequeath to him the use of my house, outhouses, stables, lots, household furniture, books, horses, carriages and whatever belongs to the household establishment and also all my slaves or such of them as he may desire to have. I do not require that any inventory or appraisement of them be made but on the breaking up of such household, he shall make out an inventory of such as remain unconsumed by use, and my other two trustees shall indorse an acceptance thereof after which time the property in such inventory shall go into the general trust and be subject to all the regulations therein laid down.

Item. I give to my niece Caroline, daughter of my brother William, one thousand dollars, payable after my debts are satisfied. I direct my executors to pay her sixty dollars per an. as interest thereof from the time of my death until paid.

26

Item. I give to my niece Rucellea, daughter of my brother Robert, two thousand dollars, payable after my debts are satisfied and I direct my executors to pay her one hundred dollars as interest thereon from my death until paid.

I have directed that a portion of my property shall be placed in the hands of my sons on their arriving at twenty one, and I have directed that my trustees shall have the power to procure extension of my debts, and I have made the payment to my sons dependent on the payment of my debts. Now on reconsideration it occurs to me that it may so happen that there will be outstanding and unadjusted accounts at the time my sons arrive at twenty one, and yet it might be in no wise injurious or improper to place my sons in possession of a part of what may be coming to them. My trustees are therefore authorized, if they think fit, to let them have a portion of what is coming to them at twenty one, even though some debts may remain unpaid. The amount of such portion shall be according to the discretion of my trustees. It shall not exceed the amount that is limited to them on the payment of debts, nor ought it to be an amount that would jeopardise their payment.

Remark. If the payment of the interest on the legacies jeopardise the payment of debts, the payment of such interest must cease without prejudice however to the right of the legatees to have the interest at the time they may be entitled to the principal. I further say that if the bequests to my brother Peter of the use of my household and slaves be found inconveniently to impair the capacity of the executors or trustees to pay debts, the use shall cease and no rights shall arise to him by such lapse or ceasing of the bequest.

I give to my son William my diamond ring. I give to my son

James the watch which my son William wears, which belonged to his mother.

I appoint my brother Peter to be guardian of my sons and I direct that no security be required of him.

I appoint my brother Peter and Walter Goodman & Peter W. Lucas to be the executors of this my will and direct that no security be required of either of them.

In testimony that this is my will I have hereto affixed my seal and have subscribed my name and written my name in the margin this 28th of February, 1846.

HENRY ANDERSON. [SEAL.]

27 We the undersigned attest that Henry Anderson signed and sealed this instrument in our presence and declared it to be his last will and we have subscribed the same in his presence and in the presence of each other.

Z. M. PHELPS.
H. M. LUSHER.
ISAAC SAFFARRANS.

"EXHIBIT B."

This indenture, made the first day of October, in the year of our Lord one thousand eight hundred and fifty-five, between Peter Anderson and Walter Goodman, both of Holly Springs in the State of Mississippi, Trustees and Executors under the last will and testament of Henry Anderson late of Holly Springs in said State, deceased, of the first part, and Charles Butler of the City of New York in the State of New York of the second part. Witnesseth, that the said parties of the first part, by virtue of the power and authority to them given in and by the said last Will and Testament, and for and in consideration of the sum of one dollar (and other considerations) lawful money of the United States of America, to them in hand paid, at or before the ensealing and delivery of these presents, by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs and assigns forever released and discharged from the same by these presents, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant bargain, sell, alien, release, convey and confirm unto the said party of the second part, his assigns for ever. All those certain lots of parcels of land situate lying and being in the Vistula division of the City of Toledo, County of Lucas, State of Ohio known *as* designated as lots numbers eighteen (18) nineteen (19) twenty (20) twenty-one (21) one thousand and eight (1008) one thousand and nine (1009) thirty (30) thirty-one (31) thirty-two (32) thirty-three (33) thirty-four (34) one thousand (1000) one thousand and one (1001) said lots being in one block bounded northerly by Summit Street, southerly by Water Street, easterly by Cherry Street and westerly

by Lynn Street, also Water lot number nine hundred and
28 ninety-two (992) extending from Water Street to the line of wharfing and fronting on the Miami River one hundred and seventy-six feet and sixty-five hundredths of a foot also town lots in the Port Lawrence division of said City of Toledo numbered one hundred and eighty five (185) one hundred and seventy-six (176) one hundred and eighty-eight (188) two hundred ninety-eight (298) one hundred and fifty-seven (157) forty-eight (48) two hundred and forty-six (246) two hundred and sixty-two (262) two hundred and eighty-six (286) three hundred and four (304) three hundred and thirty-two (332) three hundred and thirty-three (333) three hundred and thirty-six (336) three hundred and thirty-seven (337) and three hundred and thirty-eight (338) as the same were laid out and numbered on the recorded map of said City, being the same premises conveyed by Edson Allen, Master Commissioner in chancery, to Henry Anderson by deed dated the eighteenth November, one thousand eight hundred and forty-four.

Together with all and singular the edifices, buildings, rights, members, privileges, advantages, hereditaments and appurtenances to the same belonging, or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also the estate, right, title, interest, claim and demand whatsoever, both in law and equity, which the said testator had in his lifetime, and at the time of his decease, and which the said parties of the first part, or either of them have or hath, by virtue of the said last will and testament, or otherwise, of, in, and to the same, and every part and parcel thereof, with the appurtenances; to have and to hold the said premises above mentioned and described, and hereby granted and conveyed, or intended so to be, with the appurtenances, under the said party of the second part, his heirs and assigns, to his and their only proper use, benefit and behoof for ever. It being understood that the above described premises were conveyed to Henry Anderson in fee but held by him in his life time as a mortgage to secure the payment of a certain sum of money due from Charles Butler to Henry Anderson which fact, after his death was duly acknowledged under seal of William Anderson and James H. Anderson his only heirs at law; said parties of the first part covenant, grant, promise and agree to and with the said party of the second part his heirs and assigns, that the said party of the second part, his heirs and assigns,
29 shall and lawfully may from time to time, and at all times for ever hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy, all and singular the said hereditaments and premises hereby granted and conveyed or intended so to be, with their and every of their appurtenances and receive and take the rents, issues and profits thereof, to and for his and their own use and benefit, without any lawful let, suit, hinderance, molestation, interruption or denial whatsoever, of, from, or by them the said parties of the first part, or their assigns; or, of, from or by any other person or persons whomsoever lawfully claim-

ing, or who shall or may lawfully claim hereafter, by, from, or under them or either of them, or by, from or under their heirs or assigns any right, title, interest or estate; and that free and clear, and freely and clearly discharged, acquitted and exonerated, or otherwise well and sufficiently saved defended, kept harmless and indemnified by them the said parties of the first part, their heirs and assigns, of, from and against all and all manner of former and other gifts, grants, bargains, sales, mortgages, judgment and all other charges and incumbrances whatsoever, had, made, committed, executed or done by them the said parties of the first part, or by, through, or with their acts, deeds, means, consent, procurement or privity.

In witness whereof, the said parties there presents have hereunto interchangeably set their hands and seals the day and year first above written.

P. ANDERSON. [SEAL.]
Ex. & Trus., &c.
W. GOODMAN. [SEAL.]
Ex'r & Trustee Under the Will of H. Anderson, Dec'd.

Sealed and delivered in the presence of—
FINLEY I. WRIGHT.
S. H. FLEETWOOD.

STATE OF NEW YORK,
City and County of New York, ss:

On this ninth day of October eighteen hundred and fifty five before me a commissioner for said State appointed by the Governor of the State of Ohio, to take acknowledgments of deeds to be recorded in said State of Ohio, personally came Peter Anderson and Walter Goodman to me known to be the grantors described in and who executed the within deed and severally acknowledged the signing and sealing of said deed as their voluntary act.

30 In witness whereof I have hereunto subscribed my name and affixed my official seal.

[SEAL.] STANLEY H. FLEETWOOD,
Commissioner.

(Endorsed:) Peter Anderson & Walter Goodman trustees & executors of Henry Anderson, dec'd, to Charles Butler. Dated 1st October 1855. Deed lots in Toledo. Recorder's office Lucas Co. Rec'd for record May 2nd 1860 & Recorded May 2nd 1860 in Vol. 34 of deeds pages 110, 111 & 112. Jonathan Wynn, Recorder. Fees $1.35.

"EXHIBIT C."

This indenture, made this sixteenth day of April, in the year of our Lord one thousand eight hundred and sixty between Peter W. Lucas of Holly Springs in the State of Mississippi one of the trustees & executors under the last will and testament of Henry Anderson late of Holly Springs deceased of the first part and Charles Butler of the City of New York of the second part, witnesseth, that the said party of the first part, by virtue of the power and authority to him given in and by the said last will and testament, and for and in consideration of the sum of one dollar (and other considerations) lawful money of the United States of America, to him in hand paid, at or before the ensealing and delivery of these presents, by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part his heirs and assigns forever released and discharged from the same by these presents, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, his heirs, and assigns forever, all those certain lots of parcels of land situate lying and being in the Vistula Division of the City of Toledo, County of Lucas, State of Ohio, known and designated as lots numbers eighteen (18) nineteen (19) twenty (20) twenty-one (21) one thousand and eight (1008) one thousand and nine (1009) thirty (30) thirty-one (31) thirty-two (32) thirty-three (33) thirty four (34) one thousand (1000) one thousand and
31 one (1001) said lots being in one block bounded northerly by Summit Street southerly by Water Street easterly by Cherry Street and westerly by Lynn Street, also Water lot number nine hundred and ninety-two (992) extending from Water Street to the line of wharfing and fronting on the Miami River one hundred and seventy-six feet and sixty-five hundredths of a foot. Also town lots in the Port Lawrence Division of the said City of Toledo, numbered one hundred and eighty-five (185) one hundred and seventy-six (176) one hundred and eighty-eight (188) two hundred and ninety-eight (298) one hundred and fifty-seven (157) forty-eight (48) two hundred and forty-six (246) two hundred and sixty two (262) two hundred and eighty-six (286) three hundred and four (304) three hundred and thirty-two (332) three hundred and thirty-three (333) three hundred and thirty-six (336) three hundred and thirty-seven (337) three hundred and thirty-eight (338) as the same were laid out and numbered on the recorded map of said City being the same premises conveyed by Edson Allen, Master Commissioner in chancery to Henry Anderson by deed dated the eighteenth of November one thousand eight hundred and forty-four.

Together with all and singular the edifices, buildings, rights, members, privileges, advantages, hereditaments and appurtenances to the same belonging, or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits

thereof. And also, all the estate, right, title, interest, claim and demand whatsoever, both in law and equity, which the said Testator had in his lifetime, and at the time of his decease, and which the said party of the first part, has or hath, by virtue of the said last Will and Testament, or otherwise, of, in, and to the same, and every part and parcel thereof, with the appurtenances: To have and to hold the said premise above mentioned and described, and hereby granted and conveyed, or intended so to be, with the appurtenances, under the said party of the second part, his heirs and assigns to his — their only proper use, benefit, and behoof forever. It being understood that the above described premises were conveyed to Henry Anderson in fee but held by him in his lifetime as a mortgage to secure the payment of a certain sum of money due from Charles Butler to Henry Anderson, which fact, after his death was duly acknowledged under seal by William Anderson and James H. Anderson, his only heirs at law;

said party of the first part covenant, grant, promise and agree
32 to and with the said party of the second part his heirs and assigns, that the said party of the second part, his heirs and assigns, shall and lawfully may from time to time, and at all times forever hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy all and singular the said hereditaments and premises hereby granted and conveyed, or intended so to be, with their and every of their appurtenances, and receive and take the rents, issues and profits thereof, to and for his and their own use and benefit, without any lawful let, suit, hindrance, molestation, interruption or denial whatsoever, of, from or by him the said party of the first part, or his assigns: or, of, from, or by any other person or persons, whomsoever lawfully claiming, or who shall or may lawfully claim hereafter, by, from, or under him, or by, from, or under right, title, interest or estate; and that free and clear, and freely and clearly discharged, acquitted and exonerated, or otherwise well and sufficiently saved, defended, kept harmless and indemnified by him the said party of the first part, his heirs and assigns, of, from and against all and all manner of former and other gifts, grants, bargains, sales, mortgages, judgments, and all other charges and incumbrances whatsoever, had, made, committed, executed or done by him the said party of the first part, or by, through or with his acts, deeds, means, consent, procurement or privity. The premises herein conveyed being the same also described and conveyed in a deed executed by Walter Goodman and Peter Anderson two of the Executors and Trustees under the Will of Henry Anderson deceased dated first of October, 1855, to Charles Butler party of second part and this deed being executed by said Lucas to remove doubts in respect to the title to the premises described and conveyed as aforesaid.

In witness whereof, the said party to these presents has hereunto interchangeably set his hand and seal the day and year first above written.

P. W. LUCAS. [SEAL.]
Executor of H. Anderson, Dec'd.

Sealed and delivered in the presence of:
WM. M. SINCKLAND.
J. D. M. LITCHFIELD.

THE STATE OF MISSISSIPPI.
Marshall County:

Personally appeared before me A. W. Goodrich an acting Justice of the Peace in and for said county the within named P. W.
33 Lucas, who acknowledged that he signed, sealed, and delivered the within deed on the day and year therein mentioned as his act and deed. In testimony whereof, I have hereunto set my hand and affixed the Notarial seal of said county this 17th day of April, 1860.

[SEAL.] A. W. GOODRICH.
J. P. & ex-Officio Notary Public.

(Endorsed:) Peter W. Lucas, Trustee, etc., to Charles Butler. Dated ——, 185-, Deed. Recorder's Office Lucas Co., Ohio, received for Record May 2nd, 1860, and Recorded May 3rd, 1860, in Vol. 34 of Deeds, pages 112, 113, and 114. Jonathan Wynn, Recorder. Fees, $1.40.

"EXHIBIT D."

Whereas Charles Butler, of the city of New York, did in July, 1841, make and deliver to Henry Anderson, late of Holly Springs in the State of Mississippi deceased his promissory note in writing whereby for value received he promised to pay the said Henry Anderson on demand the sum of twenty thousand dollars with interest which said note and interest is now due and unpaid.

And the said Charles Butler as a collateral security for the payment of said note and interest caused to be assigned and delivered to the said Henry Anderson a certain bond and mortgage bearing date the 19th day of June, A. D. 1838, executed and delivered by Edward Bissell of the city of Toledo in the State of Ohio, to the said Charles Butler to secure the payment of ($21,500) twenty one thousand five hundred dollars which said mortgage was a lien on certain town lots in the city of Toledo aforesaid, therein named.

Subsequently to the assignment of said mortgage to said Anderson and by virtue of the authority therein contained and in consequence of the failure of the mortgagor aforesaid to comply with the condition of said bond and mortgage at the request of the said Charles Butler it was foreclosed by a suit instituted in the Court of Common Pleas of Lucas County, Ohio, in the name of said Henry
34 Anderson as assignee as aforesaid in which suit a decree was obtained for the sale of the said mortgaged premises. In conformity to the terms of said decree the said mortgaged premises were sold on the 24th day of September, 1844, at public sale at Toledo by Edson Allen a Master Commissioner in Chancery and were bid off at said sale in the name of the said Henry Anderson for the aggregate sum of $6921; said sale was afterwards confirmed by the Court granting the decree and a deed of the premises in due form thereupon executed and delivered to the said Henry Anderson which deed was recorded in the office of the Recorder of Lucas County aforesaid in Volume 10 of Deeds, pages 168, 169, 170 and 171.

And whereas the said Henry Anderson held and intended to hold the title to the premises above referred to in trust to secure the payment of the note of the said Charles Butler, executed to him the said Anderson.

The said Anderson having departed this life without declaring said Trust in writing leaving him surviving his two sons, William Anderson and James H. Anderson his only heirs at law, the latter a minor the former of full age and the said William Anderson being desirous of carrying into effect the wishes and intentions of his deceased father has consented to execute and deliver to the said Charles Butler, this declaration of the terms and conditions on which he holds the title to the premises above referred to remaining unsold at the date hereof.

That is to say to the following Lots in the city of Toledo, viz.: Lots 1008, 1009, 30, 31, 32, 33, 34, 1000, 1001, 18, 19, 20, 21 and Water lot 992 all in the Vistula division of Toledo as described in the Deed of the said Edson Allen Master Commissioner to Henry Anderson. Therefore

Be it known that I the above named William Anderson for and in consideration of the covenants and engagements of the said Charles Butler hereinafter contained do hereby acknowledge and declare that my interest in the above-decribed premises as heir at law of the above named Henry Anderson deceased is held in trust as security for the payment of the above mentioned note of the said Charles Butler, together with the interest now due or to become due thereon, and for no other purpose whatever. Whenever the said note shall be fully paid and satisfied by the said Charles Butler as hereinafter provided, then I the above named William Anderson for myself, my heirs, executors and administrators do hereby covenant and agree to
35 and with the said Charles Butler his heirs and assigns to execute and deliver to the said Charles Butler, his heirs or assigns at his or their request a full and complete release of all my right, title and interest in and to all or any part of the above described premises then remaining unsold and for which I may not have previously executed a release. The said William Anderson further agrees that in the event of the sale of a part or all of the above described premises at prices satisfactory to him or at such prices as shall be mutually agreed upon between him and the said Charles Butler to execute a full and ample release of his interest in the premises so sold on the condition that the purchase money so obtained be applied to the payment of the said indebtedness of the said Charles Butler.

And the said Charles Butler for himself his heirs executors and administrators doth hereby covenant and agree to and with the said William Anderson his heirs and assigns that he will well and truly pay to the executors of Henry Anderson the above mentioned note of twenty thousand dollars together with all interest due or to become due thereon in manner following, that is to say—

At the date hereof the sum of $3,376.52 and on the first day of October, eighteen hundred and fifty, the further sum of fifteen hundred dollars with all interest then due on the said note of $20,000. On the 1st day of October, 1851, the sum of $2,000. On the 1st

of October, 1852, the sum of $2500. On the 1st of October, 1853, the sum of $4000. On the 1st October, 1854, the sum of $4000. On the 1st of October, 1855, the sum of $6,000, together with all interest due on said note at the time of payment of these several instalments.

All taxes assessed or to be assessed on the above described premises are to be also paid by the said Charles Butler whenever the same become due and payable.

It is also understood and agreed that the amount which may hereafter be found due to the said Charles Butler from the estate of Henry Anderson, deceased, on the settlement between him and the executors of the said Anderson of the account between the said Butler and the said Anderson growing out of a contract between them in respect to commissions for warrantees of titles of lands sold for the American Land Company in Mississippi shall and may be applied towards the payment of said note when the same shall be finally ascertained and adjusted between the parties interested therein which amount added to the sum herein agreed to be paid at this date is supposed to be about equal to the amount of interest due
36 on said note of Charles Butler on the 1st of July, 1849.

The said Charles Butler further agrees that in the event of a default of payment of any of the above named instalments, or of the interest due at the time said instalments are payable for the term of ninety days after the same shall become due, then the whole debt remaining unpaid shall be deemed due and payable anything herein contained to the contrary notwithstanding.

In witness whereof the said William Anderson and Charles Butler have hereunto set their hands and seals this tenth day of October, 1849.

CHARLES BUTLER. [L. S.]
W. ANDERSON. [L. S.]

Sealed and delivered in presence of:
S. H. FLEETWOOD.

"Exhibit D 2."

Whereas Charles Butler of the City of New York was indebted to Henry Anderson of Holly Springs, in the State of Mississippi in the sum of Twenty Thousand Dollars, for which said Butler gave his note dated 1st July, 1841, on which note a balance remains unpaid at this date. As security for the payment of said note said Butler assigned and delivered to the said Henry Anderson in his life time a certain Bond and Mortgage executed by Edward Bissell of Toledo, to him the said Charles Butler, which mortgage was on certain premises therein described situate in the said City of Toledo, and the same was afterwards foreclosed by proceedings in the Court of Common Pleas of the County of Lucas, State of Ohio, and the premises therein described were sold at public sale by the Master Commissioner appointed for that purpose by the said Court, and were bid off in the name of said Henry Anderson to protect his security in said premises, and a deed duly executed to him therefor, which said deed is dated the eighteenth day of November, Eighteen Hundred and forty-four and

was recorded in said Lucas County in Vol. 10 of Deeds, pages 168, 169, 170, 171 January 16, 1845, reference being thereto had—portions of which lots described in said deed have been heretofore in the life time of Henry Anderson sold and conveyed by said Butler under the authority and power of said Anderson, and the portion unsold and now held under said deed is described as follows, to-wit:

37 Town lots in the Vistula Division of the City of Toledo, in the County of Lucas, State of Ohio, known and designated as Lots 18, 19, 20, 21, 1008, 1009, 30, 31, 32, 33, 34, 1000, 1001, said lots being in one block bounded Northerly by Summit Street, Southerly by Water Street, Easterly by Cherry Street, and Westerly by Lynn Street. Also Water Lot No. 992, extending from Water Street to the line of wharfing, and fronting on the Miami River one hundred and twenty-six 65-100 feet.

And whereas the said Henry Anderson took and held the title to said mortgaged premises as security for the payment of the debt owing by said Butler to him as aforesaid, on the payment of which said premises were to be released and conveyed to the said Charles Butler or his representatives. The said Henry Anderson died in March, 1846, not having made or executed any declaration in writing for the purpose for which said property was held, and since the death of said Henry Anderson, the said Butler has made several payments of large sums of money on account of said debt to the estate of said Henry Anderson. And whereas James H. Anderson is the only child and heir at law of the said Henry Anderson, and is willing and desirous to execute a proper instrument or declaration in writing explanatory and declaratory of the facts aforesaid in respect to the said property and to carry into effect the intention of his father to the end that justice may be done. Therefore these presents witness that I, the said James H. Anderson hereby acknowledge and declare that the said premises and every part thereof have been and are held as security for the payment of the balance which is due or which may at any time appear to be due on the said note or obligation, from the said Charles Butler to the estate of said Henry Anderson, and for no other purpose or interest whatever, and on the payment of said note and interest the said premises shall and will be duly released and conveyed to the said Charles Butler, his heirs or assigns, and I the said James H. Anderson do hereby stipulate and covenant with the said Charles Butler, his heirs and assigns that, upon the request of said Butler, his heirs or assigns, I will execute, acknowledge and deliver any other or further assurance in the premises, so that the lots of land aforesaid shall be held subject to the payment of the principal and interest of the aforesaid debt and for no other purpose.

In witness whereof, I have hereunto set my hand and seal

38 this sixteenth day of September, eighteen hundred and fifty-one.

[SEAL.] JAS. H. ANDERSON.

Sealed and delivered in presence of
W. GOODMAN.
S. H. FLEETWOOD.
P. ANDERSON.

STATE OF NEW YORK,
City and County of New York, ss:

On the sixteenth day of September, Eighteen hundred and fifty-one, before me, a Commissioner for said State of New York, appointed by the Governor of the State of Ohio, to take acknowledgement of deeds and other instruments in writing to be used or recorded in said State of Ohio, personally came James H. Anderson to me known to be the person described and named in and who executed the within instrument, and acknowledged the signing and sealing of the same as his voluntary act.

In witness whereof I have hereunto subscribed my name and affixed my official seal.

[SEAL.] STANLEY H. FLEETWOOD,
Commissioner, &c.

Memorandum between Charles Butler and James H. Anderson this 1st October, 1852, witnesseth that in consideration of the payment of the said note of the said Charles Butler to the executors of the said Henry Anderson as herein agreed the time for the payment thereof is hereby extended as follows viz: the sum of twenty-five hundred dollars ($2,500) on the date hereof the sum of $4,000 *dollars* on the 1st October, 1853, the sum of $4,000 on the 1st October, 1854, the sum of $4,000 on the 1st October, 1855, and the balance on the first day of October, 1856, with interest at 6 per cent on the whole sum to be paid annually on the 1st October in each year and the said Charles Butler agrees to make the said payments as aforesaid and this agreement is to be taken in connection with and supplemental to the agreement of the parties hereto appended dated 16th September, 1851.

Witness our hands and seals, this 1st October, 1852.

[SEAL.] JAMES H. ANDERSON.
[SEAL.] CHARLES BUTLER.

Witness:
S. H. FLEETWOOD.
W. GOODMAN.

39 STATE OF NEW YORK,
City and County of New York, ss:

On this first day of October, eighteen hundred and fifty-two before me as a Commissioner for said ——, appointed by the Governor of the State of Ohio, to take acknowledgment of deeds and other instruments to be recorded in said State of Ohio, personally came James H. Anderson and Charles Butler, to me known to be the grantors described in and who executed the within instrument, and severally acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed.

In witness whereof, I have hereunto subscribed my name and affixed my official seal.

[SEAL.] STANLEY H. FLEETWOOD,
Commissioner for Ohio in New York.

"EXHIBIT D 3."

This indenture, made the seventh day of April in the year one thousand eight hundred and sixty, between James H. Anderson of Austin, Tunica County, in the State of Mississippi (late of Holly Springs in said State), and Lida G., his wife of the first part and Charles Butler of the City of New York of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar (and other considerations) lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released and quit-claimed, and by these presents do remise, release and quit-claim, unto the said party of the second part, and to his heirs and assigns, forever, all those certain lots or parcels of land situate, lying and being in the Vistula Division of the City of Toledo, County of Lucas, State of Ohio, known and designated as lots numbers Eighteen (18), Nineteen (19), Twenty (20), Twenty-one (21), One thousand and eight (1008), One thousand and nine (1009), Thirty (30), Thirty-one (31), Thirty-two (32), Thirty-three (33), Thirty-four (34), One thousand (1000), One thousand and one (1001), said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street, also Water lot number nine hundred and ninety-two (992) extending from Water street to the line of wharfing and fronting on the Miami River one hundred and seventy-six feet and sixty-five hundredths of a foot. Also
40 Town Lots in the Port Lawrence Division of said City of Toledo numbered one hundred and eighty-five (185), one hundred and seventy-six (176), one hundred and eighty-eight (188), two hundred and ninety-eight (298), one hundred and fifty-seven (157), forty-eight (48), two hundred and forty-six (246), two hundred and sixty-two (262), two hundred and eighty-six (286), three hundred and four (304), three hundred and thirty-two (332), three hundred and thirty-three (333), three hundred and thirty-six (336), three hundred and thirty-seven (337), and three hundred and thirty-eight (338) as the same were laid out and numbered on the recorded map of said City; being the same premises conveyed by Edson Allen, Master Commissioner in Chancery to Henry Anderson by deed dated the eighteenth of November, one thousand eight hundred and forty-four. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also, all the estate, right, title, interest, dower, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the above mentioned and described premises,

together with the appurtenances unto the said party of the second part, his heirs, and assigns, forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JAMES H. ANDERSON. [L. S.]
LIDA G. ANDERSON. [L. S.]

Sealed and delivered in the presence of

Q. GOODMAN.
B. W. WATTHALL.

Printed word "fifty" erased word "sixty" inserted.

THE STATE OF MISSISSIPPI,
Marshall County:

Personally appeared before me, A. W. Goodrich, an acting Justice of the Peace and ex-officio Notary Public in and for said county, the within named James H. Anderson and Lida G. Anderson, his wife, who severally acknowledged that they signed, sealed and delivered the within deed on the day and year therein mentioned as
41 their act and deed—the said Lida G. Anderson on a private examination separate and apart from her said husband acknowledged that she signed, sealed and delivered said deed as her vountary act and deed freely without any fear, threats or compulsion of her said husband.

In testimony whereof I have hereunto set my hand and affixed the notarial seal this 16th day of April, A. D., 1860.

[SEAL.] A. W. GOODRICH.
J. P. & ex-Officio Notary Public.

Endorsed: James H. Anderson and Wife to Charles Butler, Dated 7th April, 1860. Quit Claim Deed. Recorded office Lucas Co. Received for Record May 2nd-60 and recorded May 3rd, 1860, in Vol. 34 of Deeds, pages 114 and 115, Jonathan Wynn, Recorder. Fees 90 cts.

"EXHIBIT E."

Whereas Charles Butler of the City of New York, as collateral security for the payment of his note in favor of Henry Anderson of Holly Springs, in the State of Mississippi, for twenty thousand dollars, heretofore duly assigned to the said Henry Anderson, a certain bond executed by Edward Bissell of Toledo, in the county of Lucas and State of Ohio, bearing date the 19th day of May, 1838, and conditioned for the payment of twenty-one thousand five hundred dollars, in one year from the date thereof with interest, together with a certain mortgage collateral to said bond executed by the said Edward Bissell and Jane A. M. his wife, on certain lots of land, lying in the Port Lawrence Division of Toledo aforesaid, in said mortgage particularly

specified, and whereas default having been made in the payment of the moneys intended to be secured by said bond and mortgage, such proceedings in relation thereto have been taken in the name and behalf of the said Henry Anderson the assignee of said bond and mortgage, that an order for the sale of the premises embraced in said mortgage has been duly made and confirmed; and whereas also a decree or judgment has been or may be obtained in favor of the said Henry Anderson against the said Edward Bissell personally, for the amount of such deficiency as may be due on said bond and mortgage after the sale of the mortgaged premises.

And whereas the said Charles Butler as a further collateral
42 security for the payment of his said note, in favor of the said Henry Anderson, has heretofore duly assigned to the said Henry Anderson, five hundred and forty-six shares of the capital stock of the Erie and Kalamazoo Railroad Company, of the par value of fifty dollars per share.

And whereas the said Henry Anderson at the instance and request of the said Charles Butler and in consideration of the covenant of the said Charles Butler hereinafter contained is willing to relinquish and surrender to the said Charles Butler, the collateral securities, so assigned as aforesaid, for the payment of said note of twenty thousand dollars, so far as the same may be done without prejudice or injury, to the order obtained for the sale of the said mortgaged premises, and the rights of the said Henry Anderson under the same, and without prejudice to the personal liability of the said Charles Butler, to the said Henry Anderson on the principal debt.

Now therefore these presents witness, that in consideration of the premises and for the purpose of giving effect to the same, the said Henry Anderson has on the day of the date hereof executed and delivered a power of attorney to the said Charles Butler, empowering and authorizing him fully and effectually, if he shall see fit to do so, to release and discharge the said Edward Bissell of and from all personal claim, demand or liability, whatsoever for or on account of the said bond and mortgage, but without prejudice to the proceedings, which have been or may be adopted, to effect the sale of the said mortgaged premises and that the said Henry Anderson has also by instrument in writing released and transferred to the said Charles Butler the said five hundred and forty-six shares of Erie and Kalamazoo Railroad Company stock.

And the said Charles Butler, in consideration of the surrender and relinquishment of the said securities hereby covenants and agrees to and with the said Henry Anderson, that the same shall not be held or construed in any way to effect or impair the liability of him the said Butler on the said note for twenty thousand dollars, and the said Charles Butler also covenants and agrees to and with said Henry Anderson that the said Butler, will well and faithfully apply and pay over to the said Henry Anderson, on account of the said note, all sums of money or other valuable consideration, which he the said Butler may receive or derive, by reason of the surrender and relinquishment of the securities aforesaid, by him the said Henry Anderson.

43 In testimony whereof the said Henry Anderson and Charles Butler have hereunto respectively set their hands and seals, in duplicate this fourth day of October in the year one thousand eight hundred and forty-four.

[SEAL.] (Signed) HENRY ANDERSON.
[SEAL.] CHARLES BUTLER.

In presence of
(Signed) S. H. FLEETWOOD.

"EXHIBIT F."

This indenture, made the twenty-second day of February in the year one thousand eight hundred and forty-three, between Sidney Bissell, Edward Bissell and Jane A. M., his wife, of the City of Toledo, Lucas County, Ohio, of the first part, and Charles Butler of the City of New York, of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of One Dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, remised, released, and by these presents do grant, bargain, sell, remise, release, and forever quit claim, unto the said party of the second part and to his heirs and assigns forever, all those certain pieces, parcels, or lots of land situate, lying and being in the City of Toledo, in the County of Lucas and State of Ohio, and described as follows, to-wit: Town lots numbered eighteen (18), nineteen (19), twenty (20), twenty-one (21), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1000), one thousand and one (1001), one thousand and eight (1008), one thousand and nine (1009), nine hundred and ninety-two (992), in the Vistula Division of the City of Toledo as the same are laid out and numbered on the map or plat of said city made by Robert Gower, surveyor, and now recorded or on file in the office of the Recorder of Deeds for said County; also town lots numbers forty-eight (48), one hundred and fifty-seven (157), one hundred and eighty-five (185), two hundred and forty-six (246), one hundred and eighty-eight (188), two hundred and sixty-two (262), two hundred and eighty-six (286), two hundred and ninety-eight (298), three hundred and four (304), three hundred and thirty-two (332),
three hundred and thirty-three (333), three hundred and
44 thirty-six (336), three hundred and thirty-seven (337), three hundred and thirty-eight (338) and ninety-seven (97), and ninety-eight (98), the two last named lots running from Summit Street to the front line of wharfing as established by the proprietors of the Port Lawrence Division of Toledo. The said last mentioned lots from and including lot number forty-eight to and including lot number ninety-eight as the same are contained in the above description are all situate in said Port Lawrence Division of said city and laid out numbered and designated on the said map before named.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining; and the

reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest or demand whatsoever, of the said parties of the first part, either in law or equity, of, in and to the above bargained premises, with the said hereditaments and appurtenances. To have and to hold the said lots and premises to the said party of the second part and to his heirs and assigns, to the sole and proper use, benefit and behoof of the said party of the second part his heirs and assigns forever.

In witness whereof, the said parties of the first part, have hereunto set their hands and seals the day and year first above written.

SIDNEY BISSELL. [L. S.]
EDWARD BISSELL. [L. S.]
JANE A. M. BISSELL. [L. S.]

Signed, sealed and delivered in the presence of:
JUNIUS FLAGG.
FREDERICK BISSELL.

In the fifteenth line the words and figures following were interlined before signing, to-wit: "two hundred and ninety-eight (298)".

THE STATE OF OHIO,
Lucas County, ss:

On this 13th day of March, A. D., 1843, personally came before me the subscriber, the within named Sidney Bissell, Edward Bissell and Jane A. M. Bissell, the wife of the said Edward Bissell, and acknowledged the execution of the within deed to be their free act and deed for the uses and purposes therein mentioned. And the said Jane A. M. being by me examined separate and apart from her said husband and the contents of said deed made known and explained to her, acknowledged that she executed the same without any fear or coercion of her said husband and that she is still satisfied therewith.

Witness my hand and notarial seal the day and year last above written.

[SEAL.] JUNIUS FLAGG,
Notary Public, Lucas Co., Ohio.

(Endorsed:) Edward Bissell, Jane A. M., his wife and Sidney Bissell to Charles Butler. Deed 992. Transferred Oct. 13, 1849. W. F. Dewey, Auditor. Recorder's office, Lucas County, Ohio. Received for record Oct. 11, 1849. Recorded Oct. 13, 1849, Vol. 16, Deeds, pages 446 & 7. Henry Thacher, Recorder.

"EXHIBIT G".

This agreement between Charles Butler of the one part and Henry Anderson of the other part, Witnesseth:

Whereas the trustees of the American Land Company did by contract with the said Henry bind themselves to pay to the said Henry

as compensation for the risk of executing warrantees for lands the sum of five per cent on Indian reservations and two and one-half per cent for all other lands held by said company and purchased by the said Henry as one of the agents of said Company which will appear reference being had to a contract dated 10th August 1840.

And whereas the said trustees have by resolution or agreement bound themselves to Charles Butler to compensate him for like risks in like manner for all the lands belonging to said company, and have resolved that warrantees made by the said Henry shall be considered as part performance by the said Charles under said resolution.

Now the said Henry agrees that the said Charles shall have one-half of the commissions agreed to be paid to the said Henry for such risk to be computed on all lands sold, and to be sold, after the said 10th of August 1840 on condition that the said Charles join with the said Henry in the said warrantees, taking one half of the risks. And it is agreed that he shall in all things participate with the said Henry equally in his aforesaid contract with the trustees so far forth as sales thereafter to be made are therein provided for. And the said Charles agrees with the said Henry that he shall have one-half of the commissions agreed by resolution of the
46 trustees to be paid to the said Charles for his risk as aforesaid to be computed on all lands sold or to be sold in the States of Mississippi and Arkansas on condition that the said Henry join with the said Charles in said warrantees taking one-half of the risk. And it is agreed that he shall in all things participate with the said Charles equally in all the benefits secured to him by the resolution or agreement of the trustees aforesaid so far forth as the lands aforesaid are concerned.

And it is mutually agreed that the commissions arising from the warrantees shall be set apart for the mutual indemnity of the parties to this contract for losses that may arise on said warrantees the same shall be invested from time to time as conveniently may be, on interest, and the interest shall be reinvested for the space of fifteen years and at the expiration of that time the same may be divided but either party requiring it, shall be entitled to good and sufficient security to the amount of the sum divided and withdrawn by the other, to meet any loss on the warrantees that may arise to the amount so withdrawn.

And it is agreed that the said Henry shall invest the said commissions and he shall render yearly accounts to the said Charles of the sums arising from commissions and the mode of investment and the securities taken: and touching said securities he shall not be responsible to the said Charles for the goodness thereof but as to the time of investment he shall be bound to invest so soon as five hundred dollars shall arise or he shall be chargeable with interest thereon at the rate of 8 per cent per annum. And in case of the death of the said Henry his representatives shall invest as aforesaid. And it is agreed that if the contract of the said Henry with the trustees or the resolution of the trustees with the said Charles

be rescinded or impaired the consideration of this contract shall not be deemed to have failed.

Now in consideration of the foregoing agreement the said Charles hath and doth hereby bind himself to the said Henry to perform all and singular the stipulations on his part to be done and performed and the said Henry hath and doth hereby bind himself to the said Charles to do and perform all and singular the stipulations on his part to be done and performed according to the true intent and meaning of said agreement.

Done and executed this twenty-first day of September in the year A. D. 1841.

CHARLES BUTLER. [SEAL.]
HENRY ANDERSON. [SEAL.]

47 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Stipulation No 2.

SEC. 1. It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys, that Charles Butler, under whom the defendant claims title to the real estate made the subject of this action, died at his then home, in the City of New York, N. Y., on December 13, 1897; that the written instruments, books, documents statements, letters, press copies of letters and statements, and all other instruments, described in Exhibit "A" hereto attached and hereby made a part hereof, were each and all at or shortly after the death of said Charles Butler found amongst and with the family and other papers of said Charles Butler; that each and all of said instruments were at all times after the death of said Charles Butler, until shortly after the commencement of this case, in the possession and custody and under the control of Miss Emily O. Butler, the only surviving child and sole heir at law of said Charles Butler, deceased; that shortly after the commencement of this case, said Miss Emily O. Butler delivered each and all of said instruments to her cousin, Mr. Willard Parker Butler, at his law office No. 59 Wall street, in the City of New York, N. Y., and that each and all of the instruments described in said Exhibit A, are now produced by him; that each and all of said written instruments, books, documents, statements, letters and press copies of letters and statements, and other instruments, described in said Exhibit "A" were written prior to and more than thirty years before the commencement of this cause; that to avoid the taking of depositions herein and thus subserve the mutual convenience of both

parties hereto and reduce the expenses of said parties, each and all of said instruments described in said Exhibit "A" shall, upon the execution hereof, be delivered to Mr. Oliver B. Snider, attorney at law of Toledo, Ohio, who shall transmit same to Toledo, Ohio, same there to be kept in his custody and under his control
48 until said instruments, or any of them, shall be desired by either of the parties hereto for use upon the trial of this case, when same shall be produced by him for such use, and any further or other proof whatsoever with respect to the genuineness and authenticity of any and all of said instruments described in said Exhibit "A" shall be and hereby is dispensed with, and said instruments, or any of them, described in said Exhibit "A" may be offered in evidence at the trial of this cause by either of said parties without formal notice to produce them, or any of them, any such notice being hereby waived, any such offer, however, of any of said instruments to be subject to objections for want of competency or relevancy for reasons other than the genuineness and authenticity of said instruments or of any of them, or the omission to give formal notice to produce same.

SEC. 2. It is further hereby stipulated and agreed by and between said parties, by their respective attorneys, that until the trial of this cause only the attorneys of record therein shall be entitled to examine said instruments and until the final determination of this cause said instruments shall at all times remain in the possession and under the custody and control of said Mr. Oliver B. Snider, or his legal representatives, when the same shall be returned to said Mr. Willard Parker Butler, and copies of said instruments received in evidence may be substituted for the originals for making up the record in this cause.

SEC. 3. It is further stipulated, that Caleb O. Halstead, who is referred to in the letters described in Exhibit "A", was during his lifetime the president of the bank of the Manhattan Company, of the City of New York, and has been dead for many years; that Willard Parker Butler, with the cashier of said bank, has made careful and diligent search among the books, papers and records of said bank, as to the existence of the deed referred to in the correspondence set forth in Exhibit "A" as having been left with said Halstead at the Manhattan Bank, and no record or information concerning the same could there be found, or obtained.

No. 4. That Stanley H. Fleetwood, formerly of the City of New York, was for many years the confidential clerk for Charles Butler, and certain of the letters described in Exhibit "A" purporting to have been written and signed by him, either in his own name or on behalf of Charles Butler, are in the handwriting of said Fleetwood.

49 No. 5. It is further agreed that the said Miss Emily O. Butler, and her cousin, Willard Parker Butler, have each made thorough search among papers, books and documents of the said Charles Butler, deceased, for the note of $20,000 executed by the said Charles Butler to Henry Anderson to secure which the said Charles Butler assigned the Bissell mortgage referred to in another

stipulation this day entered into between the parties hereto: that said note was not found among said papers, books or documents, nor has the same ever been seen by said Miss Butler or her said cousin, but that among Mr. Butler's papers some time prior to the year 1904, there was found an envelope marked "Anderson Settlement" or something substantially to that effect, containing what appeared to be some letters, accounts and other papers, which said envelope and its contents were destroyed with other papers, all then supposed to be of no value, of the contents of said envelope nothing further is known.

6th. It is further agreed, that at the time the executors and trustees of the will of Henry Anderson, deceased, turned over to James H. Anderson, in settlement of their trust, the property and effects coming to him under said will (which took place some time prior to May 1st, 1860) the note last herein referred to, had not been fully paid or extinguished, and that if any payments were thereafter made and intended as credits upon said note, the same were made to James H. Anderson. But either party shall be at liberty to offer proof concerning the precise date when the executors and trustees of Henry Anderson, deceased, were finally discharged, such proof to be subject to all legal objections.

7th. The foregoing stipulation or any part thereof, may be used and read in evidence at the trial of this action, by either party, with the same force and effect that proof of the facts therein recited, would have were the same offered and proven in open court in the regular and ordinary way, and subject to all objections for competency, relevancy and materiality (save those excepted heretofore) that might be made against such proof and facts were they offered in the regular way in open court, either of the said parties being at liberty however, to offer additional proofs of the foregoing or other facts in this action, in support of their respective titles, subject to the same objections and exceptions.

In witness whereof, said parties have executed this stipulation by their respective attorneys, at the City of New York, this
50 first day of June, one thousand nine hundred and five.

PETER ANDERSON,
By RHEA P. CARY, *Attorney.*
ROSEWELL E. MESSENGER,
By KING & TRACY,
CLAYTON W. EVERETT, AND
O. B. SNIDER,
His Attorneys.

"EXHIBIT A."

Referred to in and made a part of the foregoing stipulation.

List of instruments, books, documents, statements, letters, press copies of letters and statements and all other instruments delivered to Oliver B. Snider, Esq., of Toledo, Ohio, by Willard Parker Butler, Esq., of New York City, N. Y., on the first day of June, 1905.

1. Letter book marked "C. Butler's Letters, June, 1847, to April, 1849."

2. Letter book marked "Business Letters from May, 1849, to January, 1852, Charles Butler."

3. Letter book marked "Letters, Charles Butler, January, 1857 to August, 1860."

4. Letter book marked "C. Butler's letters, August, 1860, to August, 1867."

5. Letter file marked "Letters Received, January, 1859, to December, 1849."

6. Letter file marked "Letters Received, January, 1850, to October, 1851."

7. Letter file marked "Letters Mississippi from — to the first letter being dated March 27th, 1857."

8. Letter file marked on back "Letter received Mississippi from — to —." The first letter being dated April 21st, 1854.

9. Bundle of Miscellaneous letters from Peter Anderson, Henry Anderson, Walter Goodman, John Fitch, and Morrison R. Waite to Charles Butler.

10. Envelope containing receipts of Walter Goodman, Executor, Peter Anderson, Executor, Statement of account dated September 27th, 1852; original note for $7,430.10, dated October 1, 1853; draft for $2,172.70 drawn by James H. Anderson at Memphis, Tennessee, March 8th, 1861, on Charles Butler, No. 12 Wall
51 Street, New York, and stamped "Received Payment. American Exchange, National Bank."

11. Bundle containing original papers Exhibits B to G inclusive mentioned in stipulation, bearing like date herewith; also certified copy of deed of Edson Allen, Master, to Henry Anderson, dated 18th day of November, 1844.

12. Release Henry Anderson to Edward Bissell.

Any other letter press copy books of Charles Butler than those above described between 1852 and 1857 have been searched for and cannot be found.

RHEY P. CARY, *Atty.*,
ROSEWELL E. MESSENGER,
By KING & TRACY,
CLAYTON W. EVERETT, AND
O. B. SNIDER,
His Attorneys.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Stipulation No. 3.

It is hereby stipulated and agreed by and between the parties hereto, acting through their respective attorneys, as follows:

First. That this stipulation, and the admissions contained herein shall be for use in any trial of this cause, or any review thereof, and absolutely limited thereto, it being understood that the plaintiff makes the admissions hereinafter shown solely for the purpose of obviating the necessity, considered by the defendant to exist, for a continuance in order to take further proof.

Second. That the defendant agrees that his application for a continuance this day made to the court shall be withdrawn and further agrees to enter into a trial thereof, waiving the intervention of a jury, on Saturday, June 17th, 1905, or as soon thereafter as may suit the convenience of the court.

52 Third. That on May 7th, 1850, Charles Butler wrote a letter to Walter Goodman, Executor, stating that he was indebted to the estate of Henry Anderson on May 1st, 1850, in the sum of nine thousand three hundred and sixty and ninety-seven hundredths dollars ($9360.97).

Fourth. That on January 1st, 1857, Peter Anderson, one of the executors of Henry Anderson's will, was paid by Charles Butler the sum of four thousand dollars ($4000.00) on the note of twenty thousand dollars ($20,000.00) made by said Butler.

Fifth. That on May 7th, 1860, there was deposited in the Manhattan Bank of New York City, by Charles Butler, to the credit of James H. Anderson the sum of two thousand forty-one dollars ($2041.00) as a credit upon said note of twenty thousand dollars ($20,000.00).

Sixth. That on August 9, 1860, Charles Butler mailed to James H. Anderson a check on the Manhattan Bank of New York City for five hundred dollars ($500.00) for credit on said note of twenty thousand dollars ($20,000.00).

Seventh. That on February 1st, 1861, there was deposited to the credit of James H. Anderson in the Manhattan Bank of New York City the sum of two thousand four hundred nineteen and forty-nine hundredths dollars ($2,419.49), as a credit upon said note of twenty thousand dollars ($20,000.00).

Eight. That the parents of Henry Anderson died some years prior to the date of his death.

Ninth. The foregoing admissions are each and all to be subject to exceptions and objections for incompetency, irrelevancy and immateriality.

Witness the signatures of the said parties, this seventeenth day of June, 1905.

PETER ANDERSON,
By C. A. THATCHER,
R. P. CARY,
His Attorneys.
ROSEWELL E. MESSINGER,
By KING & TRACY,
CLAYTON W. EVERETT, AND
O. B. SNIDER,
His Attorneys.

53 In the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

Cause No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Stipulation No. 4.

In the above entitled case it is hereby stipulated, that the letters written and sent by Charles Butler of New York City, to Henry Anderson of Holly Springs, Mississippi, Walter Goodman, Peter Anderson and James H. Anderson or either of them, and the letters from The Manhattan Bank of New York City to said parties or either of them, and all accounts, documents, statements and schedules accompanying and mentioned in said letters are lost or destroyed.

That subject to such objections as to competency or relevancy and materiality as might be made against originals were they in existence and duly produced and proven in open court the letter press copies of said letters, accounts, statements and schedules now in the possession of the defendant, mentioned in the notice of the defendant to the plaintiff, dated May 2nd, 1905, for the production and inspection of the original of said letters, documents, schedules and accounts may be read in evidence on the trial of this case, with the same force and effect the originals would have were they in existence, produced and proven in open court.

But no admission is hereby made as to the competency of the originals were they produced and proven as aforesaid, but such competency and relevancy is to be first determined by the court.

Said copies now in the possession of said defendant, shall at all reasonable times be open to the inspection of the plaintiff's counsel at the office of Clayton W. Everett, 110 the Valentine, Toledo, Ohio.

In witness whereof the parties do sign their names to duplicates hereof by their respective counsels, this 13th day of May, A. D. 1905.

PETER ANDERSON,
By C. A. THATCHER, *His Att'y.*
KING & TRACY AND EVERETT,
By C. W. EVERETT,
Att'ys for Defendant.

54 In the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Stipulation No. 5.

It is hereby stipulated and agreed by and between the parties in the above entitled case by their respective attorneys as follows:

First. That the gross income to defendant from the property in controversy, from September 16th, 1902, the date of the death of James H. Anderson to and until December 27th, 1904, the date of the filing of the petition herein, a total period of two years three and one-half months, was thirty thousand ($30,000.00) dollars.

Second. That during said period of two years three and one-half months, defendant paid for and on account of said property the following sums:

Taxes and assessments	$8,250.00
Insurance and repairs	3,500.00
For water rent, electric light, coal for heating said building and janitor services	5,250.00
Total	$17,000.00

Third. That the gross income to defendant from the property in controversy from December 27th, 1904, at which date the petition was filed herein, to June 20th, 1905, was six thousand five hundred ($6,500.00) dollars.

Fourth. That during said period of about six months, defendant paid for and on account of said property the following sums:

Taxes and assessments	$1,650.00
Insurance and repairs	750.00
For water rent, electric light, coal for heating said building and janitor services	1,100.00
Total	$3,500.00

The statements contained in the foregoing stipulation or any of them, may be offered and read in evidence by either of the parties to this cause, upon the trial thereof, with the same force and effect that the proof of said facts in the usual way would have,
55 subject however to such objections as said parties respectively may see fit to interpose thereto for want of competency, relevancy or materiality.

In witness whereof the parties hereto have executed this stipulation this 20th day of June, A. D. 1905.

PETER ANDERSON,
By C. A. THATCHER, &
R. P. CARY,
Attorneys for Plaintiff.

ROSEWELL E. MESSINGER,
By C. W. EVERETT,
O. B. SNIDER AND
KING & TRACY,
Attorneys for Defendant.

(Copy.)

42½.

NEW YORK, 28 *December*, 1858.

W. Goodman, Esq.

MY DEAR SIR: I have paid the taxes on the property mortgaged by me to Mr. Anderson amounting to about $2500.00 and so saved the premises from sale on the 20th inst. for taxes—this includes about $1100.00 extra paying tax, also an amt. due for grading streets chargeable against these lots. Enclosed I hand you a statement again of the lots held as security for my debt to Mr. Anderson and also a statement of the amount due on that debt on one January, 1859.

If you can arrange to turn out securities to Mr. Anderson that will be available to him for the whole, or any part of this debt, and take the transfer of the securities so as to control it I can make the amount available here by payments into "to" the American Land Company from time to time within the ensuing 18 months or 24 months.

In the adjustment of the accounts of the company and the division of the security it has occurred to me you could do this and so relieve Mr. Anderson and me both, giving to him, what would be more speedily available to him at the south, and giving to me, the freedom of time and arrangement here and which I can more readily "—"

I want the deed to be delivered to me so that I can make sales of the property after dividing it up into smaller city lots and making the property itself available for these payments which I can compass, and in the meantime hold it as security for my payment here.

56 The lots donated to the Bethel Church I want to have released as they are proceeding against it to perfect title and enclosed hand you a release which please ask Mr. Anderson to execute and send it forward without delay. You may be assured that the security is not diminished by this gift as it was the object to get the Society to go on and build a fine church which they have done on the lot which fronts on Lynn St.

Please arrange this in accordance with the suggestion above, if practicable, and oblige me; affairs prospectively are better with me.

In haste.

Very truly yours.

(Signed) CHARLES BUTLER.

(Copy.)

(*Statement Accompanying Letter of December 28th*, 1858.)

Memo. of Debt to Wm. Anderson.

1 JAN'Y, 1858.

Charles Butler to Estate of Henry Anderson.

1854, October 1, to amount due as per account settled this *this* date	$10,100.22
1855, Oct. 1st, 1 year's interest at 6 per cent	606.01
After 1 Oct., 1855, 7 per cent was to be allowed.	
1857, Jan'y 1, interest on principal 1 year and 3 months from 1 October, 1855, to date 7 per cent	883.76
1857, Jan'y 1	$11,589.99
1857, January 1, amount paid Peter Anderson cash	4,000.00
Due 1 January, 1857	$7,589.99
1859, Jan'y 1, interest 2 years 7 per cent	1,062.59
Due 1 Jan'y, 1859	$8,652.58

As security for the above J. H. Anderson holds the title to 13 lots in the City of Toledo, viz: Lots 18, 19, 20, 21, 30, 31, 32, 33, 34, 1000, 1001 and 1008. These 12 lots forming a block bounded by Summit Street on the west Cherry Street on the north, Water Street on the east and Lynn Street on the south. 187 feet front in Summit Street running through same width to Water Street—
57 about 500 feet on Cherry and 400 on Lynn Street;

Also Water lot fronting on Water Street opposite the above block 126 feet in width—subject to a controversy about the title to a strip 50 by 100 feet. No buildings on any of the lots.

43.

PARIS, *4th May*, 1859.

MY DEAR SIR: On my arrival in this city from Peau, where we spent the winter, I received yours by which I was glad to hear that your health is good, and that you are in a fair way to arrange your business.

I was a little disappointed that your letter contained nothing in relation to the debt you owe the estate of my brother. My last letter from James says you have not written to him about it. "Now" says

he "I do not want to be hard on Mr. Butler, but I am determined to bring suit on the claim. Do you not think I am right?" I must state to you candidly that I thought he would be entirely right to bring suit without further delay—that the indebtedness had lasted a whole life time. I think you seem as little inclined now as twenty years ago, to hear of the matter in any way but as will serve your own interests. Why did you not make some answer to the letter in which I requested you to make some proposition that I might recommend to James to accept. Is it just or right to treat a lenient and friendly creditor with contempt? Is it consistent with justice to owe a debt and be in receipt of revenues from the mortgaged property without paying the interest of that debt?

I do not write this in anger, but only in sorrow and in justification on the advice I have given. I shall write to Mr. Goodman to prepare the papers and forward them to some lawyer in Toledo.

Mr. Goodman sent me statements of the Agency. The result has not come out as I thought, but I know of no objections that I can make. I am glad at the prospect of closing this long affair.

I hope I may be in New York, this summer. I can not but speak with uncertainty for my health continues feeble and that of Mrs. A. is not good.

I write by this mail to Wright acknowledging the dividends he placed to my credit, and requesting him to make some in-
58 quiry about the pictures. I feel anxious about them. I have also written to Rome.

We see nothing here but the movements of troops; and the Emperor leaves for the army to-morrow. No battle of any importance has as yet taken place in Sardenia, but it is expected in about a week. The Austrians appear to have relinquished the intention of marching on Turin, and will probably open battle on the line towards Genoa. There soon will be one hundred thousand troops in Sardenia.

The question is anxiously discussed what, if any, is the understanding between Ruma and France. Some think it — going the full extent of a redivision of Europe, if so a general European war would ensue. England is evidently preparing for such a conflict while her state-men profess not to believe in it. To me it seems improbable, and we may hope that a few battles favorable to the French Army will result in peace. One can not find very "convincery" arguments to convict Napoleon of any further designs than the liberation of Italy. It would greatly strengthen his throne and add to his glory. I do not think he would imperil both by the insane attempt to extend his dominion to the Rhine and then around Germany.

Yours truly,

P. ANDERSON.

P. S.—By this mail Mrs. A. Writes a letter in your care for Mr. Wm. McMillen. Please retain it until you see Mr. McMillen who thinks of coming to Europe.

44.

No. 12 Wall St.
New York, 25 *Feb.* 1860.

J. H. Anderson, Esq.:

My Dear Sir: I have finally succeeded in perfecting a sale of my property at Toledo, held by you in security for the debt, due you from me. I have contracted to sell it to Mr. Calvin Brunson, of Toledo, for $17,500, payable on the delivery of the deed on or before the first of May, of $2,041.36, and the balance half year yearly 6 per cent. on the whole principal due from the 20th January, 1860—o,v the 20th July pay't of interest $465 and 20th January following $2,465, thus making $5,000 within the ensuing 11 months. On receiving the first payment on 1 May I am to give him deed and evidence of perfect title, and take his bond
59 and mortgage for the balance payable as above.

Mr. Brunson is engaged largely in the manufacture of tobacco, and intends to improve the property immediately, and hence I could not obtain a larger cash payment. The outlay for his buildings requiring all the means that he could withdraw from his business; and I had either to forego the first and only chance of selling the property that has ever occurred, or submit to the terms proposed. He is a prompt, responsible and successful business man, and it was a great object to make the sale to him by putting the property at a low figure.

I have been engaged in the negotiation with him for nearly twelve months, having offered it to him last spring and followed it by negotiations ever since until the 20th inst., when we finally concluded it. My hope is that after taking this bond and mortgage I may in the course of the year get it cashed and give you the whole of your money. The deed to me lies in escrow with Mr. Halstead, of the Manhattan Company. This I shall want to enable me to make a title to Mr. Brunson, and receive his cash payment as above, and take his bond and mortgage for the balance as stated. This money I shall pay to your credit in the bank and substitute the bond and mortgage as your security in place of the deed.

I shall send copy of this letter also to Mr. Goodman, who will, I understand, come here in March or April, and also will, I hope, be instructed by you to attend to this business with me. It would be most unfortunate for both of us to permit this sale to fall through, and the deed must be ready to be delivered with the certificate of title showing the premises to be free and clear and an unquestioned title on making the payment on or before the 1 May. Mr. Brunson is anxious to get the title by 1 April so that he may commence improvement early in that month, and on giving him 15 days' notice said he would make the payment as soon as I was ready to make title.

The amount due to you on 1 January, 1860, will not vary much, if any, from $9,183.88. You will accept my thanks for the indulgence you have extended in this matter; but for the extraordinary losses and embarrassments occasioned by the revulsion of 1857—so

sudden and so overwhelming—you would have had the whole debt that year. It has been a struggle ever since to recover from the effects of that blow, and this sale of the Toledo property is one of the most encouraging events that has come to my aid. I did hope to accomplish it in the autumn, but could not.

In haste, truly yours,

CHARLES BUTLER.

60 45

No. 12 WALL ST.,
NEW YORK, *2nd March*, 1860.

W. Goodman.

MY DEAR SIR: I have just received your letter of the 22nd Feb. After I had written to you on the 9th Mr. Brunson, the party who was negotiating with me for the Toledo property, came to New York and wanted to negotiate for the entire block instead of a part of it, as had been talked of; after three days' constant at it we concluded a bargain, the details of which I have communicated to you, for the whole block at $17,500, but he became uneasy about the situation of the title and would not agree to pay any money till I was prepared to give him a good deed with certificate of title. I enclose a copy of the clause in the agreement between us that you may understand perfectly the great importance to me of having the deed now lying in the Manhattan Bank in escrow delivered to me that I may make a proper deed of warranty to Mr. Brunson as early as practicable that he may have no possible excuse for backing out, which would now be serious to us all.

I also hand you copy of the account as finally settled on 1 October, 1854, by you and Mr. Anderson, and which we had before us on 1 October, 1855; you and Mr. Anderson being then here and at which date you executed the deed and lodged it in escrow with W. C. Halstead, of Manhattan Bank, to be delivered to me on the order of either of you.

Since then the only payment made was of $4,000 to Peter Anderson on 1 January, 1857, of which you have also a statement, as you recollect. I hold his draft paid by me for it. By the terms of the agreement with James made in 1852 after he became of age, as you recollect, I was to pay 6 per cent. interest. In the fall of 1855 when we had the final adjustment here I agreed to pay 7 per cent. after that date and I have so computed the amount, making $9,183,88 on 1 January last. This of course is simple interest and is in accordance with our understanding.

If you will give me an order on Mr. Halstead for the deed I will lodge with him a stipulation to pay over the money to be received from Mr. Brunson on the first day of May (the $2,000 and interest on it from 26 Dec. last) and also to place with him the bond and mortgage or notes and mortgage which I am to take from Mr. Brunson for $15,000 duly assigned by me to James H. Anderson as collateral security for the payment of the balance due from me.

61 I want to place the papers at the earliest day practicable in the hands of the lawyer, M. R. Waite, Esq., of Toledo, whose

certificate of title I am bound to furnish to Mr. Brunson. Of course there is no transfer of title till the whole thing is consummated.

Please give your attention to this to aid me in perfecting this sale, which I have labored to accomplish to effect the payments of Mr. Anderson.

I will write you on other matters in another letter.

In haste, truly yours,

CHARLES BUTLER.

46.

HOLLY SPRINGS, *March* 19, 1860.

Charles Butler, Esq.

DEAR SIR: I duly received your letter in reference to your indebtedness to James H. Anderson or the estate of his deceased father. I have delayed a reply for the purpose of having an interview with James, who was at the time on his plantation. He is now here and does not seem indisposed to comply with your wishes, but thinks the mode of computing interest on payments not in accordance with law or usage. This I think will be the only difficulty in the way of the adjustment you desire.

Mr. Anderson's wife is now quite ill. It is his intention to start for New York with her as soon as she is able to travel and will then attend to the settlement with you in person.

I will have the accounts of the office made out as you desire, but may bring them up to the first of April instead of March, as you suggest.

I leave to-morrow for Washington City and may visit New York before my return home.

Yours, &c.,

W. GOODMAN.

48.

NO. 12 WALL ST.,
NEW YORK, *7th May*, 1860.

J. H. Anderson, Esq.:

MY DEAR SIR: I am happy to say that the sale to Mr. Brunson of the Toledo property was concluded, and enclosed I hand you certificate of deposit for $2,041, the amount of cash payment to apply on my debt (the balance of $9,360.97 due on May 1 instant) to your father's estate.

62 The security which I have taken from Mr. Brunson for the balance of the purchase money I will have duly assigned and placed in the hands of Mr. Halstead, of the Manhattan Bank, as stipulated to your order. I shall want a power from you to take these and send them forward to Toledo as payments come due for the payments are to be made at Toledo, an inconvenience I tried to avoid, but could not.

I hope that you and Mr. Goodman got home safely, and that you found your wife in better health.

Yours truly,

CHARLES BUTLER.

No. 12 Wall St.,
New York, 25 *Feb'y*, 1860.

My Dear Sir: Enclosed I hand you copy of letter to James H. Anderson, relative to the sale of my Toledo property, which I have accomplished after a great deal and very protracted negotiations dating back to last spring, and to a most excellent, prompt and responsible purchaser. He is one of the most largest tobacco manufacturers in the West, and his capital is embarked in that. He intends to proceed immediately on obtaining his title to improve the property and to erect extensive buildings. He holds my contract to make a good title on or before the 1st May on which he pays $2,000 and int. to that date on it. Another pay't will be made on 20th July of $456 and on the 20th January following $2,465.

I am to take his bond and mortgage for the balance of $15,500 on the first of May, which bond and mortgage I will assign and deposit with Mr. C. O. Hal-tead in Manhattan Bank. The deed to me you will recollect is in Mr. Hal-tead's hands in escrow, deposited by you some years ago, and this I shall have to have delivered to me to enable me to make my warrantee deed to Mr. Brunson; and now my dear sir, you will see the importance of this matter to me and of your co-operation to enable me to close with Mr. Brunson, and the sooner the better.

He will pay the money as soon as he can get the title on receiving 15 days' notice. I should despair of finding another purchaser at so good a price in ten years again if this should fail me. The amount of principal and interest due from me is a little over $9,000 on the first of January instant. This amount of this sale is $17,500, the cash payment to be immediately paid James, and the bond and mortgage assigned. I should add that the water lot is not in-
63 cluded in my sale. That is in dispute in respect to title and quantity, and having no improvement on it is of very little value, and could not be sold for anything, nor could I make title to it.

I hope to see you here in March or April and beg that you will aid me in closing this sale. I want the deed as soon as I can get it, and this can only be delivered on your order. My stipulation is to have all the papers at Toledo on or before the first of May, and my plan would be to have them all here in the hands of my counsel, M. R. Waite, Esq., to be delivered and put on record simultaneously on payment of the $2,000, and the execution and delivery of the bond and mortgage by Mr. Brunson. Mr. Waite can also act for you and receive the money and take the bond and mortgage if you desire, but I presume you would consider me your agent for that purpose.

Please let me know at what time you expect to come on North, and what, if anything more, is required of me before you leave home.

In haste, dear sir, truly yours,

CHARLES BUTLER.

H. Goodmon, Esq., Holly Springs, Miss.

Charles Butler to Calvin Brunson, contract 20th Feb., 1860, for sale of entire block $17,500, payable $2,000 "in" delivery of deed on or before 1st May with abstract and certificate of M. R. Waite of

good title and balance $15,500 in annual payments from 20th January, 1860, of $2,000 each. Interest semi-annually 20th January, 6 per cent. on whole sum due payable in sight exchange of New York.

C. B.

50.

No. 12 Wall Street,
New York, *9th Aug.*, 1860.

J. H. Anderson, Esq.

My Dear Sir: Enclosed I hand you check on the Manhattan Bank for $500 five hundred dollars on account of debt due you as per statement of amount due on 1 May last which amount please indorse. On the 7th May I sent you certificate of deposit for $2,041 on same account, which I presume was duly received, tho I have no acknowledgment. The payment by Mr. Brunson 20th July just received was $465. I have made it an even sum of $500.

In haste, truly yours,

CHARLES BUTLER.

64 New York, 1 *Feb.*, 1861.

J. H. Anderson, Esq.

My Dear Sir: I have in deposit subject to your draft or drafts on me $2,419.49 twenty four hundred and nineteen 49/100 dollars payment on account of my debt to you, which has been collected from the collateral Mr. Brunson's note and interest due on the 20th January. This payment as I compute the interest will leave due to you on the 28th January fifty-one hundred dollars.

I hope to hear something from you respecting the state of things in the South particularly in your State and neighborhood. We feel of course the deepest interest in the course of events and yet indulge hopes that there may be a favorable turn and the union be preserved.

In haste, dear sir, truly yours,

CHARLES BUTLER.

State of Ohio,
County of Lucas, ss:

I, R. R. Kinkade, presiding Judge of the Court of Common Pleas of Lucas County, in the State of Ohio, hereby certify that Thomas H. Barkdull, who signed the above and foregoing twenty-five certificates to the foregoing twenty-five copies, was, at the time of signing the same, and is now, the County Recorder of said Lucas County, duly commissioned and qualified; and as such County Recorder has the custody of the records of land contracts, deeds and mortgages of said county; that said attestations and each of them are and is in due form and by the proper officer, according to the laws of the State of Ohio, and that his above signatures as said County Recorder to each of said twenty-five certificates *is* genuine.

Witness my hand and seal, at Toledo, in said County of Lucas, this 5th day of May, A. D., 1905.

[Seal Common Pleas Court, Lucas County, Ohio.]

R. R. KINKADE,
Judge of the Court of Common Pleas, Lucas County, O.

STATE OF OHIO,
Lucas County, ss:

I, Jacob M. Weier, Clerk of the Court of Common Pleas in the State and County aforesaid, do hereby certify that R. R. Kinkade, who signed the above certificate, was at the time of signing the same and now is the duly elected, qualified, commissioned and acting presiding Judge of the Common Pleas Court of said County of Lucas.

65 In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Toledo, in said County this 5th day of May, A. D., 1905.

[Seal Common Pleas Court, Lucas County, Ohio.]

J. M. WEIER, *Clerk.*

COPY DEF'T'S EXHIBIT No. 8.

Statement of Note to Henry Anderson, 1 October, 1852.

1 July, 1841, note for	$20,000.00	
Inst. to 1 Oct., 1852, 11 yrs. 3 mos. 6 per cent	13,500.00	
		$33,500.00
CR.:		
1 June, 1848, ½ of a/c Coms. (11,934.97)	$5,967.49	
Inst. to 1 Oct. 52, 4 yrs. 4 mos.	1,551.42	
1 June, 1852, ½ of a/c (624.31)	312.15	
Inst. 4 mos.	6.24	
	$7,837.30	
Less ½ of Coms. refunded on sales cancelled & Inst	312.24	
		7,525.06
1 Oct., 1849, cash paid	$3,376.52	
Inst., to 1 Oct., 1852, 3 yrs.	607.86	
		3,984.38
1 Oct., 1850, cash paid	$2,700.00	
Inst., to 1 Oct., 1852, 2 yrs.	324.00	
		3,024.00
1 Oct., 1851, cash paid	$3,110.00	
Inst. to 1 Oct. '52 (1 yr.)	186.60	
		3,296.60
		$17,830.04
Leaving due 1 October, 1852		$15,669.96

E. E.

CHARLES BUTLER.
W. H. GOODMAN.
Executor of H. Anderson, Deceased.

New York, Sept. 27, 1852.

$1669.96 received of Charles Butler sixteen hundred sixty nine 96/100 dollars on this note to H. Anderson, this 1 Oct., 1852.

Executor of H. Anderson, Deceased.
W. H. GOODMAN.

66 DEFENDANT'S EXHIBIT No. 10.

$3,376.52. NEW YORK, 6 *Oct.*, 1849.

Received of Charles Butler, three thousand three hundred and seventy-six 52/100 dollars, which amount is to be credited and indorsed on the note of Charles Butler to Henry Anderson, dated 1 July, 1841.

W. GOODMAN,
Trustee and Ex. of H. Anderson, Dec'd.

DEFENDANT'S EXHIBIT No. 9.

Received of Charles Butler, two thousand seven hundred dollars this 1st Oct., 1850, to be applied to his note due the estate of Henry Anderson.

P. ANDERSON, *Ex'r.*

City of New York, 1 Oct., 1850.

DEFENDANT'S EXHIBIT 11.

HOLLY SPRINGS, *May 12th*, 1855.

Received of Charles Butler on the 20th April last three thousand dollars, which amount has been endorsed on his note of $20,000 due to the estate of H. Anderson, dec'd, as of that date.

W. GOODMAN,
Ex'r of H. Anderson, Dec'd.

DEFENDANT'S EXHIBIT No. 12.

Amt. due 1 Oct., 1852	$2,500.00
Amt. due 1 Oct., 1853	4,000.00
Int. on $14,000 1 yr. to Oct., 1853	840.00
	$7,340.00
Interest	90.10
	$7,430.10

7,340 dols. NEW YORK, *Oct.* 1, 1853.

For value received I promise to pay to the order of W. Goodman and P. Anderson, trustees and executors of the estate of Henry Anderson, deceased, seven thousand three hundred and forty
67 dollars, with interest, on or before the first of December next and the payment of $7,340 as of 1 Oct., 1853, to be endorsed on my note due the estate of H. Anderson.

CHARLES BUTLER.
By S. H. FLEETWOOD, *His Att'y.*

(Endorsed as follows:) Pay Walter Goodman, P. Anderson, Exers. and Trustees of the estate of H. Anderson.

DEFENDANT'S EXHIBIT No. 13.

NEW YORK, *Sept.* 27, 1852.

Received from Charles Butler five thousand nine hundred and sixty-seven 49/100 dollars ($5,967.49) on the 1 June, 1848, and also the sum of fifteen hundred and fifty-one 42/100 dollars ($1,551.42) for interest from 1 June, 1848, to 1 Oct., 1852, on the first named sum, making together $7,518.91, seven thousand five hundred and eighteen 91/100 dollars, to be credited on Charles Butler's note held by the executors of Henry Anderson, dated 1 July, 1841, for $20,000.

$5,967.49
1,551.42

$7,518.91

W. GOODMAN,
Ex'r of H. Anderson, Dec'd.

NEW YORK, *Sept.* —, 1852.

Received from Charles Butler, Esq., two thousand dollars, to be credited on his note held by the executors of Henry Anderson for $20,000, dated 1 July, 1841, as of the 1 October, 1851.

$2,000.

W. GOODMAN,
Ex'r of H. Anderson, Dec'd.

DEFENDANT'S EXHIBIT No. 14.

$2,172.70. MEMPHIS, TENN., *M'ch 8th*, 1861.

Pay to the order of F. R. Farnsworth, Treas., twenty-one hundred seventy-two 70/100 dollars.

68 Value received and charge the same to account of—

JAMES H. ANDERSON.

To Chas. Butler, No. 12 Wall St., N. Y.
No. —.

(Endorsed:) 744. Pay American Exc. Bk. New York or order. F. R. Farnsworth, Treas.

In the Circuit Court of the United States for the Northern District of Ohio. Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

"Notice."

In the above entitled cause the plaintiff is hereby noti-ed that the defendant demands an inspection, with leave to take a copy of the following letters and documents in the possession of the plaintiff, namely:

1st. All letters between Charles Butler, late of New York City, New York, and Henry Anderson, late of Holly Springs, Mississippi, between the year 1837 and April 1st, 1846.

2nd. Also all letters and statements of accounts between the executors of the will and trustees of the estate of Henry Anderson, deceased, and said Charles Butler or any representative of his from the date of the death of said Anderson in April, 1846, down to and including the year A. D., 1861.

3rd. Also all letters and statements of accounts between said Charles Butler and Peter Anderson after the death of said Henry Anderson and between the dates of April 1st, 1846, and January, 1862.

4th. Also all letters and statements of accounts between said Charles Butler and any attorney or representative of said executors and trustees and said Peter Anderson after the death of said Henry Anderson.

5th. Any letters or statements from the Manhattan Bank of New York City to said executors or trustees or any representative of them in any manner relating to Charles Butler or his indebtedness to or against the estate of Henry Anderson, deceased

69 together with all exhibits and accounts mentioned in any of the above mentioned letters, which said letters and statements of accounts so far as the defendant is capable of describing, are as follows:

1st. Letter from Charles Butler to W. Goodman, dated Sept. 29th, 1847.

2nd. Letters from Charles Butler to W. Goodman dated Feb'y 9th, 1848.

3rd. Letter from Charles Butler to Peter Anderson, dated May 3rd, 1848.

4th. Letter from Charles Butler to Peter Anderson, dated May 17th, 1848.

5th. Letter from L. H. Fleetwood to W. Goodman, dated May 27th, 1848.

6th. Letter from Charles Butler to W. Goodman, dated June 15th, 1848.

7th. Letter from Charles Butler to W. Goodman, dated July 8, 1848.

8th. Letter from Chas. Butler to W. Goodman, dated July 25, 1848.

9th. Letter from Charles Butler to W. Goodman, dated January 23rd, 1849.

10th. Letters from Charles Butler to W. Goodman, dated February 9th, 1849.

11th. Letter from Charles Butler to Peter Anderson, dated February 23, 1849.

12th. Letter from Charles Butler to W. Goodman, dated April 10th, 1849.

13th. Letter from Charles Butler to W. Goodman, dated October 6th, 1849.

14th. Letter from W. E. Jones to W. Goodman, dated Oct. 12th, 1849.

15th. Letter from Charles Butler to W. Goodman, dated October 24th, 1849.

16th. Letter from Charles Butler to W. Goodman, dated December 3rd, 1849.

17th. Letter from Charles Butler to Peter Anderson, dated January 22nd, 1856.

18th. Letter from Charles Butler to Peter Anderson, dated April 18th, 1857.

19th. Letter from Charles Butler to James H. Anderson, dated July 1st, 1857.

20th. Letter from Charles Butler to James H. Anderson, dated July 28th, 1858.

21st. Letter from Charles Butler to James H. Anderson, dated February 26th, 1860.

22nd. Letter from Charles Butler to W. Goodman, dated
70 March 2nd, 1860.

23rd. Letter from Charles Butler to James H. Anderson, dated May 7th, 1860.

24th. Letter from Charles Butler to W. Goodman, dated July 28th, 1860.

25th. Letter from Charles Butler to James H. Anderson, dated August 9th, 1860.

26th. Letter from Charles Butler to James H. Anderson, dated February 1st, 1861.

27th. Letter from Charles Butler to P. Anderson and W. Goodman, dated September 19th, A. D., 1871.

28th. Letter from C. J. Careda to James H. Anderson, dated March 6th, 1878.

29th. Statement of I. H. Fleetwood dated Sept. 15th, 1852.

30th. Schedule containing statement of note of Henry Anderson dated October 1st, 1852, from Charles Butler to the Executors of the will of Henry Anderson, deceased.

31st. Statement of account between Charles Butler and Henry

Anderson's estate, from Chas. Butler to the Executors of Henry Anderson's will, dated January 1st, 1858.

32nd. Statement of account between Charles Butler and the estate of Henry Anderson, dated October 1st, 1853, from Chas. Butler by S. H. Fleetwood, his attorney to the Executors of Henry Anderson.

33rd. Statement of account between Charles Butler and the estate of Henry Anderson, dated August 21st, 1855, from Charles Butler to the Executors of the will of said Henry Anderson.

34th. Statement of account between Charles Butler and the estate of Henry Anderson, dated Jan. 1st, 1859, from said Chas. Butler to the Executors of Henry Anderson.

35th. Two statements of account between Chas. Butler and the estate of Henry Anderson, dated October 1st, 1855, from said Charles Butler to the Executors of Henry Anderson.

36th. Statement of account between Charles Butler and the estate of Henry Anderson, dated May 1st, 1860 from Charles Butler to the Executors of Henry Anderson.

37th. Statement of account between Charles Butler and the estate of Henry Anderson, dated February 1st, 1861 from Chas. Butler to the executors of Henry Anderson.

71 38th. Also any and all other statements of account between the estate of Henry Anderson and Chas. Butler whatever may be their date.

39th. Also all letter books kept by Henry Anderson, deceased, between the years 1837 and his death in April, 1846, so far as said letter books show any letters or communications to Chas. Butler of New York City or refer to the mortgage on the Toledo Property, or the transactions involved in this case.

40th. Also all letter books kept by the Executors of the will and Trustees of the estate of Henry Anderson from the date of their appointment in April, 1846 down to and including the year 1861, in so far as they show any communications to Chas. Butler of New York, or any person representing him, or The Manhattan Bank of New York City, or any officer of said bank, or S. H. Fleetwood, an attorney of Chas. Butler residing in New York City.

41st. Also all books of account kept by the Executors of the will and Trustees of the estate of Henry Anderson, deceased, from the time of their appointment in April, 1846 down to and including the year 1861, insofar as they show any accounts between Charles Butler of New York and said estate.

42nd. Also any and all other letters or communications from Chas. Butler or S. H. Fleetwood his attorney or any other person in his behalf to Henry Anderson while living, or his executors or the Trustees of his estate after his death whatever may be their date.

You are further notified to produce and have said letters, documents and books present at the trial of this action as the defendant wishes to introduce the same in evidence in this case.

Toledo, Ohio, May 2nd, 1905.

KING & TRACY AND
CLAYTON W. EVERETT,
Attorney- for the Defendant.

Received copy of the above on this 3rd day of May, A. D., 1905.

C. A. THATCHER,
Atty. for Plaintiff.

(Endorsements on Bill of Exceptions:) United States Circuit Court, N. D. O., W. D. Peter Anderson, plaintiff, vs. Rosewell E. Messinger, Defendant. Plaintiff's Bill of Exceptions. This Bill of exceptions is now correct and we approve same July 26th, 1905. King & Tracy, Clayton W. Everett & O. B. Snider, Att'ys for
72 defendant. Rhea P. Cary & C. A. Thatcher, Att'ys for plaintiff. Filed, Aug. 2, 1905, Irvin Belford, Clerk U. S. Circuit Court, N. D. O.

June Term, A. D. 1905, to wit, August 2, 1905.

Present: The Honorable Robert W. Taylor, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL E. MESSENGER.

Now comes the plaintiff, Peter Anderson, and presents to the court his certain Bill of Exceptions to the action of the court in the various particulars therein set out, which is signed, sealed and made a part of the record in this case.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897. Law.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Petition for Writ of Error.

Now comes Peter Anderson, plaintiff herein, and says that on or about the 28th day of June, A. D., 1905, this court entered judgment herein in favor of the said defendant and against this plaintiff, in which judgment and proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the
73 Sixth Judicial Circuit, for the correction of the errors so complained of, and that a transcript of the record proceedings,

and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

RHEA P. CARY,
CHAS. A. THATCHER.
Attorneys for Plaintiff.

(Endorsement:) No. 1897. In the U. S. Circuit Court Northern District of Ohio, Western Division. Peter Anderson, plaintiff, vs. Rosewell E. Messinger, defendant. Petition for Writ of Error. Filed, Aug. 2, 1905, Irvin Belford, Clerk, U. S. Circuit Court, N. D. O. Rhea P. Cary & Charles A. Thatcher, Attorneys, Toledo, Ohio.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897. Law.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Assignment of Errors.

Plaintiff in this action in connection with his petition for a writ of error makes the following assignment of errors which he avers occurred on the trial of this case, to-wit:

1. The court erred in admitting in evidence on behalf of the defendant Section Nine of Stipulation No. One, attached to and made a part of the Bill of Exceptions.

2. The court erred in admitting in evidence on behalf of the defendant Deed from the executors of Henry Anderson to Charles Butler, being Exhibit B to paragraph nine of said Stipulation No. One.

3. The court erred in admitting in evidence on behalf of the defendant Section Ten of Stipulation No. 1.

4. The court erred in admitting in evidence on behalf of the defendant Exhibit C referred to in Section Ten of Stipulation No. One and attached to said Stipulation No. One.

5. The court erred in admitting in evidence on be-
74 half of the defendant Section Eleven of Stipulation No. One.

6. The court erred in admitting in evidence on behalf of the defendant Exhibit D referred to in Section Eleven of Stipulation No. One, and attached thereto.

7. The court erred in admitting in evidence on behalf of defendant Section Twelve of Stipulation No. One.

8. The court erred in admitting in evidence on behalf of the defendant Exhibit D-2 referred to in Section 12 of Stipulation No. 1 and contained therein.

9. The court erred in admitting in evidence on behalf of the de-

fendant Exhibit D-3, referred to in Section 12 of Stipulation No. 1, and contained therein.

10. The court erred in admitting in evidence on behalf of the defendant Section- thirteen, fourteen, fifteen, sixteen, seventeen and eighteen of Stipulation No. One.

11. The court erred in admitting Exhibit F referred to in Section 15 of Stipulation No. 1, and attached thereto, in evidence on behalf of defendant.

12. The court erred in admitting in evidence on behalf of the defendant Exhibit G referred to in Section 17 of Stipulation No. 1 and attached thereto.

13. The court erred in admitting in evidence on behalf of the defendant contract dated October 4, 1844, between Henry Anderson and Charles Butler, marked Exhibit E, and made a part of Stipulation No. 1.

14. The court erred in admitting in evidence on behalf of the defendant paper marked Stipulation No. 4, dated May 13, 1905.

15. The court erred in admitting in evidence on behalf of the defendant Section- one, two, three, four and five of Stipulation No. 2, attached to and made a part of the Bill of Exceptions herein.

16. The court erred in admitting in evidence on behalf of the defendant Exhibit A to Stipulation No. 2.

17. The court erred in admitting evidence on behalf of the defendant showing the statement from the Annual Accounts and Reports of the Executors and Trustees of Henry Anderson's estate of payments made by Charles Butler to said Executors and Trustees on note of $20,000.00.

18. The court erred in admitting in evidence on behalf of the defendant a paper showing an account stated which is marked Defendant's Exhibit No. 8.

19. The court erred in admitting in evidence on behalf of the defendant the following: receipts marked respectively De-
75 fendant's Exhibit No. 9, Defendant's Exhibit No. 10, Defendant's Exhibit No. 11, Defendant's Exhibit No. 12.

20. The court erred in admitting in evidence on behalf of the defendant paper marked Defendant's Exhibit No. 13.

21. The court erred in admitting in evidence on behalf of the defendant paper marked Stipulation No. 3, excepting that part relating to letters written by Mr. Butler.

22. The court erred in admitting in evidence on behalf of the defendant paper marked defendant's exhibit No. 14.

23. The court erred in admitting in evidence on behalf of the defendant the letters marked Nos. 42½, 43, 44, 45, 46, 48, 49, 50, and 51, referred to in Exhibit A to Stipulation No. 2.

24. The court erred in admitting in evidence on behalf of the defendant the following deeds from the City Clerk of Toledo to Charles Butler, attached to said Bill of Exceptions, and respectively marked as follows: "Clerk's Deed No. 1; Clerk's Deed No. 2; Clerk's Deed No. 3; Clerk's Deed No. 4; Clerk's Deed No. 5; Clerk's Deed No. 6; Clerk's Deed No. 7; Clerk's Deed No. 8; Clerk's Deed No. 9.

25. The court erred in admitting in evidence on behalf of the de-

fendant the notice served on plaintiff's counsel to produce instrument dated May 2nd, 1905, attached to said Bill of Exceptions and marked "Notice."

26. The court erred in admitting in evidence on behalf of the defendant Stipulation No. 3, attached to said Bill of Exceptions herein.

27. The court erred in sustaining defendant's motion for judgment in favor of the defendant.

28. The court erred in rendering judgment for the defendant when the same should have been for the plaintiff.

29. The court erred in overruling plaintiff's motion for a new trial.

PETER ANDERSON,
By His Attorneys, RHEA P. CARY,
CHAS. A. THATCHER.

(Endorsement:) No. 1897. U. S. Circuit Court, N. D. O. Peter Anderson, plaintiff, vs. Rosewell E. Messinger, defendant. Assignment of Error. Filed, Aug. 2, 1905, Irvin Belford, Clerk, U. S. Circuit Court, N. D. O. Charles A. Thatcher, Attorney & Counsellor, Gardner Bldg., Toledo, O.

76 June Term, A. D., 1905, to-wit: August 2, 1905.

Present the Honorable Robert W. Taylor, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER

This 27th day of July, A. D. 1905, came the plaintiff herein, by his attorney and filed herein and presented to the court his petition, praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of two hundred and fifty dollars, which shall operate as a supersedeas bond.

In the Circuit Court of Appeals of the United States for the Sixth Judicial Circuit.

PETER ANDERSON, Plaintiff in error,
vs.
ROSEWELL E. MESSINGER, Defendant in error.

Writ of Error.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States, To the Honorable Judge of the Circuit Court of the United States for the Northern District of Ohio, Western Division, Greeting:

77 Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court, before you, between Peter Anderson, plaintiff and Rosewell E. Messenger, defendant, a manifest error hath happened to the great damage of the said Peter Anderson, plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, together with this writ, so that you have the same at the City of Cincinnati, Ohio, in said Circuit, on the 26th day of August next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

ROBERT W. TAYLER, *Judge.*

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Northern District of Ohio, ss:

In pursuance of the command of the Writ of Error within, I, Irvin Belford, Clerk of the Circuit Court of the United States for the Northern District of Ohio, herewith transmit true copy of the record, bill of exceptions, assignment of errors, and all proceedings in this case of Peter Anderson vs. Rosewell E. Messinger, lately pending in the Circuit Court of the United States for the Northern District of Ohio, under my hand and seal of said court.

Witness my official signature, and the seal of said Circuit Court, at the city of Toledo, in said District, this 25th day of August, in the year of our Lord one thousand nine hundred and five, and of the In-

dependence of the United States of America the one hundred and thirtieth.

[SEAL.]

IRVIN BELFORD,
Clerk of the Circuit Court of the United States for the Northern District of Ohio.

By J. W. WILSON,
Deputy Clerk.

78 In the Circuit Court of Appeals of the United States for the Sixth Judicial Circuit.

PETER ANDERSON, Plaintiff in error,
vs.
ROSEWELL E. MESSINGER, Defendant in error.

Citation.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To Rosewell E. Messinger, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, Ohio, in said circuit, on the 26 day of August, 1905, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Ohio, Western Division, wherein Peter Anderson is plaintiff in error, and Rosewell E. Messinger, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this 27th day of July, one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and twenty-nine.

ROBERT W. TAYLER,
District Judge.

We hereby this 7th day of August 1905, accept due personal service of this action on behalf of the said Rosewell Messinger said defendant in error.

CLAYTON W. EVERETT,
One of the Attorneys for Said Defendant in Error.

Aug. 7th 1905.

79 United States Circuit Court, Northern District of Ohio, Western Division. June Term, A. D. 1905, to-wit: August 2, 1905.

Present the Honorable Horace H. Lurton, U. S. Circuit Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

For satisfactory reasons appearing to the court the time for filing the record in this cause in the Circuit Court of Appeals, pursuant to the writ of error sued out, is extended until the first day of October, 1905.

Aug. 19, 1905.

Enter above.

HORACE H. LURTON,
Circuit Judge.

80 And afterwards to-wit on September 1st, 1905, praecipe for appearance of counsel was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1479.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as counsel for the plaintiff.

RHEA P. CARY.

And afterwards to wit on February 12th, 1906, an entry was made upon the Journal of said Court in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1479.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

81 This cause is argued in part for plaintiff in error by Mr. Rhea P. Cary and is continued until tomorrow for further hearing.

And afterwards towit on February 13, 1906, an entry was made upon the Journal of said Court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1479.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

This cause is further argued for plaintiff in error by Mr. Rhea P. Cary and for defendant in error by Mr. Clayton W. Everett and is continued until tomorrow for further argument.

And afterwards towit on February 14, 1906, an entry was made upon the Journal of said Court in said cause clothed in the words and figures as follows:

82 United States Circuit Court of Appeals for the Sixth Circuit.

No. 1479.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

This cause is argued for defendant in error by Messrs. Clayton W. Everett and H. E. King, and for plaintiff in error by Mr. C. H. Trimble and is submitted to the Court.

And afterwards towit on June 5, 1906 judgment was entered in said cause in the following words and figures:

United States Circuit Court of Appeals for the Sixth Circuit.

Before Lurton, Severens and Richards, C. J. J.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

Error to the Circuit Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Ohio and was argued by counsel.

83 On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed with costs and the cause is remanded to the said Circuit Court with directions to award a new trial.

And afterwards towit on July 5, 1906, an opinion was filed in said cause clothed in the words and figures as follows:

Opinion.

84 No. 1479.

United States Circuit Court of Appeals, Sixth Circuit.

PETER ANDERSON, Plaintiff in Error,
vs.
ROSEWELL E. MESSINGER, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Ohio.

Submitted February 14, 1906.
Decided June 5, 1906.

Before Lurton, Severns and Richards, Circuit Judges.

SEVERENS, Circuit Judge, delivered the opinion of the court.

This is an action of ejectment brought by Anderson, the plaintiff in error, to recover the possession of certain lots in the city of Toledo, Ohio, described in his petition, of which he claims the legal title, and the possession of which, he says, is wrongfully withheld by the defendant. The answer denies the alleged title of the plaintiff, and denies the plaintiff's right to the possession. A stipulation was filed waiving a trial by jury, and consenting to a trial by the court. Upon the trial, proof of all the material facts was made by mutual stipulations which are incorporated in the bill of exceptions. The court rendered judgment for the defendant, the entry reciting that the court "does find the issues of the cause with the defendant."

As the facts material to the judgment were agreed, this must
85 mean that the court found the issues of law for the defendant. Supervisors v. Kinnicott, 103 U. S. 554; Hulitt v. Ohio Valley Nat. Bank, 137 Fed. 461, 465.

When the facts are agreed, they are the equivalent of facts found by the court and the question of the propriety of the judgment is, in each case, the same. Supervisors v. Kinnicott, 103 U. S. 554; Lehnen v. Dickson, 148 U. S. 71; St. Louis v. Telegraph Co., 148 U. S. 92.

Some other matters, hereafter to be referred to, were received in evidence over objections which were incompetent to disturb or affect the ultimate material facts, and could not therefore affect the judg-

ment. The case is properly here for review to determine whether the judgment is the one which the facts agreed required.

Each of the parties derives his title from Edward Bissell, a former resident of Toledo. On May 19th, 1838, Bissell, claiming to be the owner of the premises, gave his bond to Charles Butler of New York for the sum of $21,500, payable one year from that date with interest at seven per cent, and to secure the payment thereof, gave, with his wife, to said Butler, a mortgage on the premises in question. This bond and the mortgage were assigned by Butler on September 23, 1841, to Henry Anderson, a resident of Holly Springs, Mississippi, to secure the payment of his note to Anderson for the sum of $20,000 and interest thereon; and for further security Butler assigned to said Anderson five hundred and forty-six shares of the Erie and Kalamazoo Railroad Company of the par value of fifty dollars per share. Butler having defaulted in the payment of his note, Anderson, on September 19, 1843, filed his bill in chancery in the court of common pleas for Lucas County, Ohio, to foreclose the Bissell mortgage, making Bissell and his wife, Butler and other parties, defendants. These parties other than Butler were served with process. Butler was not served and did not appear. That suit was pursued to a decree which was rendered April 1, 1844, for the sum of $29,139.01. A sale was ordered and a master appointed to conduct it. The mortgaged lands were bid off by Henry Anderson at the price of $6,910. The sale was duly confirmed and the master was ordered to make the proper deed to the purchaser. At this stage of the proceedings and on October 4, 1844, an agreement was entered into between Butler and Anderson which, after reciting the giving of the bond and mortgage by Bissell, the assignment thereof by Butler to Anderson and the assignment of the 546 shares of railroad stock to secure Butler's note, and the above stated proceedings for the foreclosure of the mortgage, proceeded as follows:

86

"And whereas the said Henry Anderson at the instance and request of the said Charles Butler and in consideration of the covenant of the said Charles Butler hereinafter contained, is willing to relinquish and surrender to the said Charles Butler, the collateral securities, so assigned as aforesaid, for the payment of said note of twenty thousand dollars, so far as the same may be done without prejudice or injury, to the order obtained for the sale of the said mortgaged premises, and the rights of the said Henry Anderson under the same, and without prejudice to the personal liability of the said Charles Butler, to the said Henry Anderson on the principal debt.

"Now therefore these presents witness, that in consideration of the premises and for the purpose of giving effect to the same, *and* said Henry Anderson has on the day of the date hereof executed and delivered a power of attorney to the said Charles Butler, empowering and authorizing him fully and effectually, if he shall see fit to do so, to release and discharge the said Edward Bissell of and from all personal claim, demand or liability, whatsoever for or on account of the said bond and mortgage, but without prejudice to the proceedings, which have been or may be adopted, to effect the sale

of the said mortgaged premises, and that the said Henry Anderson has also by instrument in writing released and transferred to the said Charles Butler the said five hundred and forty-six shares of Erie and Kalamazoo Railroad Company stock.

"And the said Charles Butler, in consideration of the surrender and relinquishment of the securities, hereby covenants and agrees to and with the said Henry Anderson, that the same shall not be held or construed in any way to affect or impair the liability of him the said Butler on the said note for twenty thousand dollars, and the said Charles Buter also covenants and agrees to and with said
87 Henry Anderson that he, the said Butler, will well and faithfully apply and pay over to the said Henry Anderson, on account of the said note, all sums of money or other valuable consideration which he, the said Butler, may receive or derive, by reason of the surrender and relinquishment of the securities aforesaid, by him the said Henry Anderson.

"In testimony whereof the said Henry Anderson and Charles Butler have hereunto respectively set their hands and seals in duplicate this fourth day of October in the year one thousand eight hundred and forty-four.

(Signed) HENRY ANDERSON
CHARLES BUTLER."

Thereafter, on November 18, 1844, the master in pursuance of the above mentioned decree and of the sale and the order of confirmation thereof, executed and delivered his deed of conveyance to Anderson, his heirs and assigns of the premises here in question and which as above stated had been bid off by him. Prior to the date of this last mentioned agreement between Butler and Anderson, Butler had on February 22, 1843, obtained a quit claim deed of these premises from Bissell and wife. But this deed was not recorded until after Anderson's death, nor until October 13, 1849, and it does not appear that the latter ever had notice of it. After the contract of October 4, 1844, Butler made no further payment on his debt to Anderson during the lifetime of the latter, nor to his representatives until October, 1849.

The first question in the case is what, as the consequence of these proceedings for foreclosure, the sale of the property of Henry Anderson under the decree, and the agreement of October 4, 1844, between him and Butler, was the nature of the title conveyed to Anderson by the master's deed. The contention for the plaintiff is that it conveyed to him the title to the property freed from the incumbrance of the mortgage, and that the price which he paid was properly applicable to the payment pro tanto of Butler's note. For the defendant it is contended that Anderson being assignee of the mortgage and having bid off the property and taken the master's deed to himself, acquired only Bissell's equity of redemption and held the property thereafter as trustee for Butler and as
88 a continuing security for the payment of the latter's note.

It is a well-settled rule of law that when the owner of securities pledges them to secure the payment of his own debt, he impliedly

transfers the right to the remedies which will make the securities available for the payment of his debt in case of his own default. Schlieman v. Bowlin, 36 Minn. 198; Slee v. Manhattan Co., 1 Paige, 48, 78.

And there necessarily goes with this power to make the securities available, the incidental power to transfer the assignor's interest in the securities; otherwise the purchaser does not get the property pledged by the securities, but an indefinite interest depending on contingencies over which he has a remote, if any, control, a circumstance which would greatly depreciate the value of the pledge.

There is also another rule of general application which is that a pledgee, who is a trustee, can not become the purchaser at his own sale of the pledge. But this rule is not applicable to a judicial sale conducted by an officer appointed by law. Nor indeed is such a purchase absolutely void in all circumstances when the sale is a private sale and the purchaser has an interest to protect. In either of the last stated instances, the sale would be voidable if the purchaser were guilty of any fraud or other wrongful practice in the transaction; in the first instance by a refusal of the court to confirm the sale or by some judicial proceeding to impeach it, and in the latter instance by such appropriate action private or judicial as he should elect to make his objection effective. Richards v. Holmes, 18 How. 143; Smith v. Black, 115 U. S. 308; Allen v. Gillett, 127 U. S. 589; Pewabic Mining Co. v. Mason, 145 U. S. 349.

In Richards v. Holmes, supra, a deed of trust had been given to secure the payment of a note which at the time of the sale under the trust was held by Harper. The latter authorized the auctioneer to make a bid for him, and that being the best price offered, the property was struck off to him. Upon a bill filed by a subsequent incumbrancer to redeem, it was contended that the sale under the
89 trust deed was void upon the ground that the beneficiary of the trust could not bid at the trustee's sale, and that the first mortgage continued subject to redemption. But the court by Mr. Justice Curtis, observing that no fraud appeared, said:

"It was for the advantage of these complainants, as subsequent incumbrancers, that this property should sell for the best price which could be obtained. Even improper practices to enhance the price, if any such had been resorted to, could not be complained of by them. It is only some practice to prevent bidding, or procure a sale for less than the property would have otherwise brought, which can be relied on by them to avoid the sale. We have no doubt the creditor for the satisfaction of whose debt the sale was made, had a right to compete fairly at the sale; but whether he had or not, his doing so could not be injurious to the complainants."

It would have made no difference in that case if the bid had been in the trustee's name, for his act would have enured to his cestui que trust who was the real party.

And the learned Justice further said:

"And the same remark applies to the trustee. It was his duty to obtain for the property the best price he could by the use of due diligence in a fair sale. It would have been improper for him, in behalf of the creditor, to employ the auctioneer to buy at anything short

of that best price. But there was no impropriety in his employing him to bid a particular sum for the creditor, to prevent a sacrifice of the property."

But in any such case, the pledgor may, if he chooses, affirm the sale, and if he does, the ground of objection is removed. Glidden v. Mechanics Bank, 53 Ohio St. 588.

If, in the present case, the property had been sold to another party, there could be no doubt that the sale and deed would have carried to the purchaser the title which the mortgagee, Bissell, had when he made the mortgage, and would have transferred any interest which Butler had in the property to the proceeds of the sale. The trust would attach to them. And to the extent of the sum due on Butler's debt they would be a satisfaction of it. If there were a surplus it would belong to Butler. Nor could it make any difference that Anderson bid off the property. The result would be the same. If he paid to the master the amount of his bid, it would be paid back to him on its being brought into court, a formality generally dispensed with by the master's taking the receipt of the creditor for so much of the proceeds as the decree adjudges to be due to him and bringing the balance into court to be paid over to the party entitled. If as here the party who might be so entitled was beyond the process of the court, he could come in by petition and on showing his right, obtain it. Butler, the assignor, was not served with process. He was a proper, but not an indispensable, party, and he was not within the jurisdiction of the court. The object in making him a party would be to enable him to make any objections which his interest might require and to preclude him from thereafter raising any. But his agreement shows that the debt remained unpaid, and that, knowing the proceedings were pending and without suggesting any objection to them, he stipulated for their completion. The reasons on which a party in interest is allowed to purchase at a judicial sale whereby he must become answerable for his bid, are inconsistent with the motion that the proceedings have resulted in nothing more than a continuance of the trust for the same whole debt. We think the legitimate result of the foreclosure proceedings was to transfer the trust to the proceeds of the sale; for by assigning the Bissell debt and mortgage, Butler must have contemplated that the consequence must be that upon his default this transmutation of his interest by foreclosure of the mortgage and the sale of the mortgaged property would be likely to ensue.

90

We are aware that in Slee v. Manhattan Co., 1 Paige 48, it was held in substance by Chancellor Walworth that in a case where the assignee of a mortgage becomes the purchaser of the premises at a sale made under a power given by the mortgage, that, the assignee having become the purchaser at his own sale, there was no transmutation of the interest of the mortgagee; that his interest in the mortgage "remained untouched by that foreclosure," and that the purchaser had acquired thereby only the equity of redemption. The learned chancellor further indicated his opinion that the same consequence would ensue in the case of an assignee of a mortgage bidding in the property at a sale under a decree in a suit brought by him to foreclose the mortgage. This was obiter.

91

But the case has been accepted by the courts of New York as authority for the application of the doctrine to judicial sales, as well as to sales under a power in the mortgage deed. The chancellor in his opinion admitted that the authority to execute the power was vested in the assignee "by the mere act of the assigning the legal interest in the mortgage," and that if the assignee in the fair execution of the power had sold and conveyed the premises to a stranger for one-half the amount of the debt, the assignor would have been bound to pay the balance of the debt, and would have had no claim to redeem the mortgaged premises from such purchaser; "that he must have understood that the defendants (the assignees) had a right to foreclose under the statute. The premises were advertised and sold with his full knowledge of the facts, and he made no objection that they were not thus authorized to proceed." And the chancellor further says that if the assignee had foreclosed in chancery, "a stranger purchasing under the decree, would unite the legal estate which is in the defendants (the assignors) with the equity of redemption of the mortgagors sold under the decree and thus acquire the whole estate which existed in the mortgagors previous to the giving of the mortgage." But because the premises were bid off by the assignee (in that case they were sold to a person who was an agent of the assignee, who conveyed them to his principal) the chancellor held that the assignor's interest had not been cut off by the sale. This is opposed to the decision in Richards v. Holmes, supra. There might be good reason for holding in such a case that if any injury had been done to the assignor in consequence of the assignee's bidding, the former could have elected to disaffirm the sale. But the dictum that the sale to the assignee under a decree would be ineffectual to pass the title of the assignor, and the distinction made between a purchase by the assignee and one made by a stranger can not be supported, when it has been admitted that the assignee may bid at the sale. In such a case the thing sold is not one thing if sold
92 to a stranger and another thing if sold to an assignee. They were not bidding for different things, and the deed of the master is for the thing sold.

Coming then to the agreement of October 4, 1844, it is apparent that Butler knew that Anderson had bid off the property and he consented that the sale should go on to its consummation. It was not stated that the expected deed should be affected by a trust, and the insistence with which Anderson, by the stipulation of his contract, held on to the benefits of his purchase is indicative of his understanding in making the agreement, and it was indicative to Butler of Anderson's expectation. The later relinquished the control of his other securities and gave Butler the power to discharge Bissell's liability upon his note. It seems singular that Anderson would have practically stripped himself of the control of everything else in the nature of a security to a slow debtor for so large a sum as $29,000 unless he were to gain some substantial advantage under his purchase at the master's sale. And it is noteworthy that in the deeds which Butler obtained from the sons of Henry Anderson after the latter's death and which deeds will hereafter be more particularly consid-

ered, they are moved to recite that Henry Anderson took the title to said lands as security for Butler's debt and that he died without "having made or executed any declaration in writing of the purpose for which said property was held;" which seems to indicate that such a declaration was due and expected, and the inquiry is pertinent, why if there was such an understanding nothing was said about it in the agreement of October 4, 1844. Butler seems to have been very watchful for his own interests, and it seems unlikely that so important a matter should have then been overlooked and not taken care of until several years after Anderson's death and only developed while the trustees were settling his estate. But the material circumstance, now to be regarded, is that there is no fact agreed, or finding by the court which imports any qualification of the legal
93 effect of the foreclosure proceedings, the agreement of Butler and Anderson made pending those proceedings, and the master's deed following thereon.

We have given detailed exposition of special facts for the reason that it is proposed to fasten a trust upon the deed in question by proof of subsequent transactions and thereby raise an equity which would entitle the defendant to the possession of the premises notwithstanding it should be held that the plaintiff has the legal title.

We think it must be held that at the time of Henry Anderson's death he held the legal title to the lands in question unaffected by any trust in favor of Butler.

On February 28, 1846, Henry Anderson made his will, and on the 3d day of April following he died, being then a resident of Mississippi. He was at the date of his will and at the time of his death a widower. He left two children only, William, born February 12, 1828, and James H., born June 25, 1831. The parts of this will which are now material are here set forth:

"I, Henry Anderson, do make and ordain this to be my last will and testament. I declare my domicile to be the town of Holly Springs, Marshall County, State of Mississippi. I revoke the will made by me on the 3d of March, 1837, and all other wills, if any there be.

"Item. I give, devise and bequeath to Peter Anderson, Walter Goodman and Peter W. Lucas all my property, both real and personal, legal and equitable in possession, reversion or remainder, and all claims and demands whatsoever, except such right, title or claim to land, money or choses in action as I may be entitled to as one of the agents of the American Land Company and as one of the stockholders of said company; this property they shall hold in trust, and if one or more of them die, the survivors or survivor shall hold in trust for the following purposes: They shall pay my debts, other than such as may be owing to the American Land Company, out of moneys on hand and such property as may be sold least injurious to my estate. I wish them to collect debts due to me and apply to this purpose. They may, if they think fit, and can, obtain an extension of time on any debt, and they may pledge my property to raise money to pay debts. They may sell for cash or on credit, and if at any time they have funds on hand not required for debts or legacies

they may invest the same. They shall have full power to make titles for property sold and to pay charges for preservation, and in
94 all respects have the power of owners, but always as trustees. I have entire confidence in each of them, and therefore give each the power of all, so that each may do separately what all acting together may do, except in making investments; in that I wish all to join. The annual accounts of my said trustees, signed by their respective names, shall be binding on my heirs and shall be conclusively so unless error or fraud be clearly established. I have directed the payment of debts other than what I may owe the American Land Company. I exclude the debts to the company because that is subject to an account with the company, and I do not wish my trustees to make payments before that account is adjusted. The adjustment of that account, and the direction and management of the affairs of the company, so far as I have power, right or interest, I place in the hands of Peter Anderson and Walter Goodman, and when they have finally closed it, it shall become a part of the trust created by this article of my will and subject to the control of my said trustees. By saying 'it shall become a part of the trust.' I mean the effects and proceeds that I may be entitled to as stockholder and agent of the company. * * *

"Item. It is my will that when my son William arrives at the age of twenty-one years the trustees of the first and general trust shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one-half of my property, reserving thereout two fifth parts of said moiety by valuation, which my said trustees shall hold in trust and properly invest and pay over to him at the age of twenty-five years. If my interest in the American Land Company be not brought into the general trust at the time William becomes twenty-one, but is brought in at any time before he arrives at twenty-five, so soon as brought in, two-fifths shall be deducted therefrom and invested and paid over to him at twenty-five, the other three-fifths he shall have as soon as paid in. I find the above does not express my will in this: When I say two-fifths shall be deducted from the interest I may have in the Land Company for investment, and three-fifths to be paid to him, I mean two-fifths of a moiety shall be deducted and three-fifths of a moiety paid over.

"And it is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective periods of twenty-one and twenty-five years of age, being governed as to the amounts to be paid at each of the respective
95 periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the regulations laid down concerning the same.

"If either of my sons die without lineal descendents, the one surviving shall take his estate above bequeathed, and if the survivor dies without lineal descendants, then one-half both of the decedent's original portion, as well as one-half of the portion taken by survivorship, shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such

surviving son. If my brother Peter be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living shall go to his children living at the time of the decease of my said son, and if there be no children surviving, then the share shall go to my other brother and sisters surviving at the time of such decease of my son. I make the following explanation: The limitation over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years, respectively. The above limitations over shall give way to the provision of such wills."

This will was duly probated in Mississippi, and an authenticated copy of the will and of the probate thereof were thereafter duly filed in the probate court of Lucas County, Ohio, where the will was duly admitted to probate and record as a will from another state.

The construction of this will of Henry Anderson is the next subject which engages our attention. The particular question is, what did the testator intend by the words of the will:

"If either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants, then one-half both of the decedent's original portion as well as one half of the portion taken by survivorship shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother Peter be not living at the time of the
96 death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving, then the share shall go to my other brother and sisters surviving at the time of such decease of my son."

The other language of the will is important only as it sheds light upon the testator's meaning by the use of the language quoted. The plaintiff, who is the lineal descendant of the testator's surviving son, James H. Anderson, claims that the testator intended to give to each of his sons a life estate in his moiety with a remainder over to the survivor of the one first dying, in the event of his dying without lineal descendants, and to the survivor a life estate in both moieties with remainder over to the lineal descendants if such should be living at his death, and if not, then to the testator's brother Peter one-half and to his other brother and sisters, one-half, or, if Peter should not then be living, to Peter's children, if any, and if there be none, then to the surviving brother and sisters of the testator. If this is correct, the plaintiff took an estate in remainder in both moieties on the death of his father, James H. Anderson. The defendant claims that the testator intended that each of his sons should take a fee simple in one moiety, which would be defeated by his death without lineal descendants, in which event the surviving son should take a fee simple in that moiety which with the fee simple in his own moiety would be defeated by his dying without lineal descendants, in which event,

the whole estate would go to the testator's brother Peter, etc.; in other words, that each of the two sons of the testator took an estate in fee simple, which would be defeated if the survivor died without lineal descendants, whereupon the testator's brother Peter and the other collateral relatives would take the estate by way of an executory devise.

The rule by which the court will be guided is stated by Chief Justice Marshall in Smith v. Bell, 6 Peters, 68 (pp. 75, 76), as follows:

"The first and great rule in the exposition of wills, to which
97 all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. 1 Doug. 322, 1 W. Bl. 672," et seq.

And this statement has been repeated and confirmed in many subsequent cases. Brant v. Virginia Coal and Iron Co., 93 U. S. 333; Blake v. Hawkins, 98 U. S. 324; Giles v. Little, 104 U. S. 296; Cotton v. Cotton, 127 U. S. 309; Hardenberg v. Ray, 151 U. S. 126; Home v. Noble, 172 U. S. 391; Adams v. Cowen, 177 U. S. 475; Robbins v. Smith, 72 Ohio St. 1, 17.

And in order to "attain the general intent," said the court in Inglis v. Sailors' Snug Harbor, 3 Peters, 99, "words of limitation shall operate as words of purchase, and words of implication shall supply verbal omissions."

Another rule in the construction of wills is, that we are to put ourselves in the place of the testator and search all parts of the will in order to gather his meaning in the use of the words employed in the particular parts of it. If by so doing we become convinced in regard to his general purpose we use that light in preference to arbitrary rules. But if the testator's meaning can not be clearly discerned, we are at liberty, and, generally for the sake of certainty in the possession and transmission of estates, required, to apply such rules of construction as have by long usage been approved and used. It often happens that in wills in which the provisions are complex and elaborate, especially in such as are written by testators themselves, implications are seen where the testator has assumed as understood what he has not in terms expressed; and in such case, if the implication is clear, it has equal effect, as if the purpose had been expressed in words.

The relevancy of these observations is found in undertaking to determine what consequences the testator intended when he said, "If either of my sons die without lineal descendants the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants, then" to his collateral relatives. Now, we
cannot but think that to the common understanding this
98 language would convey the meaning that in the other alternative, that is, if the sons should leave lineal descendants, it was intended that they should take, and that it was only in the event of their not leaving lineal descendants, that the estate should go over to collateral relatives. The reason which gives force to the familiar rule of construction, that the inclusion of one alternative is the exclusion of the other, and vice versa, would tend to confirm

the impression. Moreover, the whole paragraph shows beyond doubt that the testator intended to prefer his lineal descendants to the collateral branches of his family. After providing that his son should take the estate by moieties, his mind went forward to the time of their death. The working of the natural instinct to keep the property in the family becomes evident. He does not say if either of my sons shall die "without heirs," but without "lineal descendants." He evidently chose his words, and the distinction is clear. It would not comport with his idea that the lineal descendants should take as heirs. Nor did he intend so wide a class. He made a distinct blunder if he discarded the familiar term "heirs" and employed the selection of "lineal descendants" if he had in mind a succession by inheritance, and not by purchase. We are now considering this paragraph as if it stood unaffected by anything else in the will, and we cannot but be much impressed by the considerations which tend to the conclusion that the testator intended that if the survivor of the sons should die leaving lineal descendants they should take the remainder.

Then, if this were doubtful, there is a long established rule of construction of devises in the law of real property, one of such as were referred to in the early part of our discussion of this subject, that when a devise can without doing violence to the language of the testator, be construed as creating a remainder, it shall not be construed as being an executory devise.

3 Comyn's Dig. 450, Devises N. 17; Fearne on Remainder, 393; 6 Cruise Dig. Tit. 38, Chap. 17, Sec. 11; Purefoy v. Rogers, 2 Saund. 380; 2 Washb. on Real Prop. 565, 3d Ed.; 4 Kent 99 Com. 263; Doe, dem. v. Considine, 6 Wal. 458, 475; Blanchard v. Blanchard, 1 Allen (Mass.) 223; Moore v. Lyons, 25 Wend. 119, 126; Wolfe v. Van Nostrand, 2 N. Y. 436.

In Purefoy v. Rogers, supra, which has always been regarded as a leading case, the Lord ch. J. Hale said: "Where a contingency is limited to depend on an estate in freehold which is capable of supporting a remainder it shall never be construed to be an executory devise but a contingent remainder only, and not otherwise." And in the note by Patterson and Williams to the 6th Ed. of Saunders, it is said that "this rule so laid down by Lord Hale has been uniformly adhered to ever since."

And upon the matter of construction Washburn says, 2d Vol. 506, same Ed., citing 2 Cruise Dig. 203: "The term remainder, it should be observed, is not one of art which it is necessary to employ in creating an estate in expectancy, such as has been described. Any form of expression indicating the intention of the grantor or devisor to do this would be sufficient." Executory devises were the creation of the judges to effectuate the intention of testators where their purpose could not take effect as the creation of a remainder. A good illustration of this subject would be to suppose that in the present instance the testator had devised to each of his sons "his heirs and assigns" the moiety, etc., and then in another place had devised the estate over upon the happening of some contingency. The estate going over could not take effect because there could be

no remainder of an estate in fee simple. It is therefore construed to be an executory devise which will defeat the fee simple estate. It is so done because the intent of the testator would be otherwise disappointed. The case of McArthur v. Scott, 113 U. S. 340, is one where both species of estates were created by the will. The testator devised his property to trustees who were to hold it until his children were dead and until his youngest grandchild should be twenty-one years old, whereupon the trustees were to divide and turn it over to his several grandchildren in fee, and if any of them
100 should have died leaving children, then to the children of such grandchild. As to the grandchildren living at the time of distribution, it was held they took an estate in remainder; but as to the children of deceased grandchildren it was held that they took by way of an executory devise. This last result followed because of the death of those grandchildren before the expiration of the precedent estate in the trustees, and therefore the gift to them could not be held to be a remainder. But to give effect to the probable intention of the testator, it was construed as an executory devise.

The essential conditions on which there can be construed to be a remainder are that there must be a precedent estate which will necessarily terminate at some future time, and there must be nominated a person who will be in esse at the termination of the precedent estate competent to take the remaining estate. Both estates must be created at the same time and by the same act or instrument. And the one must begin when the other ends. The order and succession of the estates was a requirement of the feudal system in order that there should at all times be some one to perform the obligations due to the sovereign, or his immediate feudatory, from the tenant on account of his tenure. Enough remains of this requirement to support at least in technical contemplation the rule as it formerly existed. Now, if these provisions of Anderson's will be held to convey a life estate to the sons with remainder to his lineal descendants, we have the most common form of an estate in remainder. It is not necessary that the remainder man should be in esse at the time when the will is made or becomes effective by the death of the testator. It is enough if he is in being at the time when the estate vests in possession, that is, at the termination of the particular estate. If the remainder man is in esse at the death of the testator, the right vests immediately, if not, the right is suspended, but exists in consideration of law, until he comes into being, whereupon it vests, and in either case the estate will open to let in afterborn remainder-men if any such appear. Doe v. Perryn, 3 Term
101 R. 484; 3 Comyn's Dig. Estates, B 13; 4 Kent Com. 206, note b; McArthur v. Scott, 113 U. S. 340, 380.

The contention of the defendant vests upon the assumption that the language of the will imports a devise of an estate in fee simple to the sons of the testator, and this assumption would probably be well taken if we looked only to that part of the will which devises the property to them. It is true there is no mention of heirs, but it would in the case supposed be implied that the testator intended to devise the whole estate. But the implication is removed, if from other

provisions in the will it is seen that the testator did not intend to devise an unqualified estate. And it is to be observed that the defendant's contention proposes to cut down the fee simple which the earlier parts of the will are said to devise to the sons, by a condition that the sons shall leave lineal descendants. So, in either construction of the parties, the implication which would arise from the unqualified language of the devise to the sons can not prevail. The generally accepted rule now *it* that an unqualified gift in wills to a devisee without mention of heirs imports a fee simple absolute; or, if the testator has not so great an interest therein, such an estate as he has. And this rule is incorporated in the Revised Statutes of Ohio, Sec. 5970. But this cannot apply here, as we have shown, for confessedly the gift was not of a fee simple absolute. The conditions therefore exist for the application of the rule laid down by the Lord ch. Justice in Purefoy v. Rogers—Supra.

The early rule in England was that such an implication as results from such language as is employed in this will would be sufficient to indicate that the testator meant that the lineal descendants of his sons should take an estate in remainder upon the death of the sons. In the early editions of Jarman on Wills, p. 465, the author in treating of estates by implication in wills, said: "In the application of this principle, our chief topic of controversy has been how far a devise to any person, in the event of the non-existence or on the decease of another indicates an intention to make the last-
102 named person a prior object of the testator's bounty. In such cases it is probable that the person whose non-existence is made the contingency on which the devise over is to fall into possession is placed in this position for the purpose of taking the property in the first instance; and this probability is of course greatly strengthened if the devisee is the person on whom the law in the absence of disposition would cast the property." And there are several decisions of the courts in this country which have put the same construction upon such language. Shaw v. Hoard, 12 Ohio St. 228; Wetter v. United Hydraulic Cotton Press Co., 75 Ga. 540, where the foregoing passage from Jarman is quoted; Carr v. Green, 2 McCord (S. Car.) 75. And Washburn in his treatise on the law of Real Property, lays down the rule in accordance with these decisions. He says:

"An instance of an estate tail by construction, where there is no direct limitation to the heirs of the donee's body, would be an estate to A, with a proviso that if he shall die without heirs of his body, the estate shall revert to the donor or go over to one in remainder. Here, it will be perceived, that there was no direct limitation to the heirs of A, and it is too plain for doubt that the donor intended the heirs of his body should take it at his decease, for he gives it over, or reserves it, in case he has no such heirs, and only in that contingency." 1 Washb. on Real Prop., 87, 3d Ed.; Vol. 1 of the same work, Sec. 192, 6th Ed.

The case of Shaw v. Hoard, supra, is much in point, so like the present, that if a rule of construction be also a rule of law in its application to grants and gifts of real property and that case is the

law in Ohio, we should feel bound to accept it as controlling this question in the present case, if indeed we did not agree with it. In that case, the will of the testator contained the following items:

"Item 2. I give and bequeath unto my said wife and daughter all the real estate of which I may be seized at the time of my death, to each one-half.

"Item 4. On the death of either my wife or daughter then the survivor shall have all the property left them by me; and
103 if both die without leaving any heirs of their body, then and in that case, said property shall be given to my wife's brother, William Campbell."

The wife and daughter died leaving another daughter of the mother. It was held that the wife and daughter mentioned in the will took each a life estate and that upon the death of the survivor, the remainder went by implication to the other daughter, the "heir of her body." But it is said that that case is overruled by subsequent decisions of the supreme court of that state. The principal cases which are relied upon in support of this contention are Carter v. Reddish, 32 Ohio St. 1; Piatt v. Sinton, 37 Ohio St. 353; Collins v. Collins, 40 Ohio St. 353; and Durfee v. McNeil, 58 Ohio St. 238. In the first of these cases, the judge (Chief Justice Day) who had delivered the opinion of the court in Shaw v. Hoard, was a member of the court. No intention to overrule the case of Shaw v. Hoard is indicated, nor is the case mentioned. But Judge Scott, who delivered the opinion, distinguishes a case involving the facts of Shaw v. Hoard. After referring to the cases of Parish v. Ferris, 6 Ohio St. 563, and Niles v. Gregory, 12 Ohio St. 320, cases upon which the later decisions referred to rest, he says: "Still, we should have no hesitation in finding, from the language of the will before us, that the testator intended a life estate only for the first devisees, if the sole condition of the limitation over to the nephews and nieces had been the dying of his children without issue, and without reference to the time when they should die. But such is not the language of the will." The difference was that the case supposed was the case, in its facts, of Shaw v. Hoard, and of this case, while in the case in which the judge was giving the opinion, the devise over was in the contingency of the first devisee's dying within age and without lawful issue. The distinction rests upon the fact that the contingency on which the life estate would terminate was uncertain, for the first devisee might attain the age of twenty-one and have children, in which event there would be no remainder, for both conditions would not happen. And, as we have said, a remainder must depend upon a contingency which must surely happen.
104 Nor do the other cases mention the case of Shaw v. Hoard. It may well be that its facts having been once distinguished, the court in the later cases thought it necessary to repeat the distinction and decided the cases upon its view of the special facts. However that be, that court has always adhered to the general rule that the intention of the testator is to be gathered from all parts of the will, as well from what is expressed as from what is fairly implied.

Referring to the other cases which are cited to establish that Shaw v. Hoard has been overruled, we observe that in Piatt v. Sinton, 37 Ohio St. 350, the testator devised "all my property of every description" to Lucinda Piatt * * * and in case she should die without any legitimate heirs of her body, then the same property to go over to others named. The court construed "all my property" as "all my estate," and the heirs of the body of Lucinda Piatt were strangers to the blood of the testator. In Collins v. Collins the testator devised a life estate to his wife with remainder to his two sons and their heirs, but that in the case of the death of either leaving no children, then to the survivor. But in case of the death of both of the sons leaving no children, then to the testator's heirs. In that case the estate was granted by "clear and decisive words," and the rule laid down in Thornhill v. Hull, 2 Clark & Fin. 22, was applied, which is that "it is a rule of the courts in construing written instruments that where an estate is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, not by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving the interest or estate." Moreover, an estate in remainder cannot rest upon an estate in remainder when the latter is given to one and his heirs, for the whole estate is exhausted. In Durfee v. McNiel, 58 Ohio St. 238, the testator devised all my estate, after defraying expenses, etc., to three persons equally,
105 one of whom was then unborn, and to their heirs forever, and should the child not be born alive, or should either die without heirs, each one's share should go to the survivor, and in the event that the testator should be without heirs of his body, the legacies to his children should go to his wife. No question arose of the kind here involved. The facts in the case had little or no analogy to the present. There was a clear and decisive gift of an estate in fee simple, and the contingency was that either of the children should die without heirs capable of inheriting. The devise over was held to be an executory devise.

Sometimes it is stated by the courts (we are not now referring specially to the Ohio courts) in terms that the implication must be a "necessary" implication, but by this is meant not absolutely necessary, but that it is reasonably necessary in order to carry out the intention of the testator. Inasmuch as the case of Shaw v. Hoard has never been expressly overruled and its doctrine was in a later case confirmed, even if it should be held that the rule of construction is not settled, this court would decide the question upon its own understanding of the law applicable to it.

Much reliance is placed by counsel for defendant upon the case of Abbott v. Essex Company, 18 How. 202, which they claim "is parallel with and conclusive of this case." But this is a misconception. In that case the testator had given to his two sons John and Jacob "all my estate," to use his own words, in a certain de-

scribed part of his property real and personal, and then declared that if either of his said sons should die without any lawful heirs of his own, it should go to the survivor and his heirs. And he charged the payment of certain debts and a legacy for the maintenance of a person named, upon the estates devised. After some preliminary observations, Mr. Justice Grier, who delivered the opinion of the court, said, "Our inquiry must be, therefore, from an examination of the whole context of this will: 1. Whether, independent of the second clause, by which the estate is limited over, the sons took an estate in fee simple, or only a life estate; and, 2. whether he intended to give over the share of each to the
106 other on the contingency of his death, without issue living at the time of his decease, or upon an indefinite failure of issue." He then proceeds to state the reasons for thinking the testator intended to give a fee simple estate to each of the sons. The first reason stated was that the testator in the devise to the sons had employed the words "my estate" in the property, which the learned Justice said had "always been construed to describe not only the lands devised, but the whole interest of the testator in the subject of the devise." And, as to the legacy for maintenance, he points out that it would be defeated by the death of a tenant for life. He further observes that the will stated that the payment of these debts and legacies by the devisees was the consideration for the devises, and that the devisees by acceptance of the devises, became personally liable to pay the debts and legacies charged upon them. "In such cases," he says, "it is well settled that the devisee takes a fee, without words of inheritance." "On this point, therefore," he says, "we are of opinion that John and Jacob each took a fee in their respective share, or moiety, of the estate delivered to them." None of the reasons on which the conclusion of the court was rested exist in the present case.

If, however, it should be held that the alternative phrases in the will already considered are not sufficient to show that the testator intended the lineal descendants should take a remainder, we should next consider the will upon that assumption. In the English courts the rule upon this subject has been changed by the modern decisions and its present state is exhibited in the case of Scale v. Rawlins, L. R. 45 Chan. Div. 299, and App. Cas. (1892) 342, sub nom. Rawlins Trust. In the court of appeals, Lord Justice Fry stated that the modern rule was inaugurated in Green v. Ward, 1 Russell 262, a case decided by Lord Gifford, the Master of the Rolls, in 1826. That rule is this: That the mere fact that the testator has directed that the estate shall go over to other persons if the first takers shall die without surviving "heirs of his body," "lineal descendants," or other equivalent words, is not a sufficient implication to create a remainder in such "heirs of his body" or
107 other person or class named; but that if there be other language in the will which supports the implication and upon the whole the court is satisfied that such was his purpose, it will give the devise effect accordingly. None of the decisions in Ohio or elsewhere have sanctioned a stricter rule than this. It may be ob-

served in passing, that one cannot help noticing that the English courts carry the practice of applying fixed rules to the construction of devises to an extent which is not generally adopted in this country. This may probably be explained by what was said by Mr. Justice Grier in Abbott v. Essex Company, 18 How. 202, 213: "If wills were always drawn by counsel learned in the law, it would be highly proper that courts should rigidly adhere to precedents, because every such instrument might justly be presumed to have been drawn with reference to them. But, in a country where, from necessity or choice, every man acts as his own scrivener, his will is subject to be perverted by the application of rules of construction of which he was wholly ignorant."

But, pursuing the inquiry above suggested, we see that the testator emphasizes the alternative he had stated by adding: "I make the following explanation: the limitation over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son." It is observable that his explanation relates to the death of the surviving son. He plainly intends that the presence of lineal descendants at that time shall block the way to a devise over to the next preferred classes of relatives. And he repeats the designation of "lineal descendants" instead of "heirs." He certainly intended that if such persons were living the estate should go to them in some character, and he gives them a peculiar designation. Then, again, if a fee simple was intended to be vested in the sons, words of inheritance must be implied in the gift to them, as if the gift run to him, his heirs and assigns, in express terms. To be in harmony with this, the defeasance would naturally have been incident to his dying without heirs, and it would follow that the testator
108 used the expression "lineal descendants" as a synonym for "heirs," which we must think an inadmissible proposition. The recent case of Home v. Leppardt, 70 Ohio St. 261, is pertinent to this discussion. In that case, the testator, as here, gave his estate to the first taker in general terms, later on he gave him a qualified power of disposition. And the court said, "The clear implication of such a bequest, taking all the parts together, is that B. (the first taker) is to possess a life estate. Here a life estate is implied, and is not expressly created." The power to dispose of the property was not inconsistent with the gift of a fee simple. It was an incident of such an estate. But the court laid hold of it as an implication that the testator intended only a life estate in the first taker. It certainly was not an absolutely necessary one. It was necessary only for the purpose of giving effect to the apparent intention of the testator.

There is another consideration which must not be ignored. The authorities recognize a more significant purpose in an implication which tends to cut down a larger estate to a life estate where the remainder thereby passes to a person who is in the line of descent than it would if it were to pass to a stranger. This results from the stronger motive which the testator would have to prefer the former to the latter class.

The gift of the power to dispose of the property by will when the sons should reach the age of twenty-one does not enlarge a life estate. Donelly v. Shields, 14 Ohio St. 359; Baxter v. Bowyer, 19 Ohio St. 490; Stableton v. Ellison, 21 Ohio St. 527; Huston v. Craig, 23 Ohio St. 198.

We are therefore of opinion that the intention of the testator was that the lineal descendants of the surviving son should take an estate in remainder at his decease.

The persons named as trustees accepted their appointments and they also qualified as executors.

William Anderson became of age February 12, 1849, and on October 10th of that year Butler obtained from him an agreement in writing declaring himself to be an heir-at-law of Henry Anderson and that Henry Anderson "held and intended to hold" the
109 premises in question in trust to secure the payment of Butler's note; that said Henry Anderson had died without declaring said trust in writing, and that, being desirous of carrying into effect his father's wishes and intentions, he had "consented to execute and deliver to the said Butler this declaration of the terms and conditions on which he holds the title to the premises above referred to remaining unsold at the date hereof." And Butler therein agreed to pay to the executors the sum due on his note of $20,000 in installments and at dates therein specified. William died intestate in January, 1850, unmarried and without issue

James Anderson became of age June 25, 1852. But before that time, and on September 16, 1851, Butler obtained from him a like declaration that Henry Anderson held the premises in trust, but that he having died without having made or executed any declaration thereof, he, James, in order to carry out his father's wishes and intentions, was desirous of making the declaration. But it was therein stipulated that the lands should be held subject to the payment of the principal and interest of the debt due from Butler. On October 1, 1852, there was appended to this document a "Memorandum" between Butler and James containing an agreement to change dates of payment of the note, and that the agreement should be taken as supplemental to the agreement to which it was appended. Thereafter, from time to time, Butler made payments to the executors and trustees upon his $20,000 note, but the same had not been fully paid at the time when the executors and trustees settled their trust with James Anderson and turned over to him the property and effects coming to him under said will, which was some time prior to May 1, 1860. If any more payments were made on said note, they were made to James H. Anderson. The plaintiff is the only son and child of James Anderson, and, as has been stated, was born August 27, 1859.

About the 1st of May, 1860, Peter Anderson and Walter Goodman, styling themselves executors and trustees of Henry Anderson's will, delivered a quitclaim deed of the premises in question
110 to Butler, reciting therein the receipt "of one dollar (and other considerations)." The deed recited further that it "being understood that the above described premises were conveyed

to Henry Anderson in fee but held by him in his lifetime as a mortgage to secure the payment of a certain sum of money due from Charles Butler, which fact after his death was duly acknowledged under seal of William Anderson and James H. Anderson, his only heirs at law," said first parties covenant, grant, etc. This deed purports to have been made October 1, 1855, and acknowledged October 9, 1855, but, as above stated, it was not delivered until about May 1, 1860. On April 17, 1860, Lucas, the other executor and trustee, but signing as executor, executed and on or about May 1, 1860, delivered to Butler a deed of the same premises in the same form, for a like consideration, and with the same recitals as the deed from Goodman and Peter Anderson. On April 23, 1860, Butler gave a warranty deed of the lands in question to Calvin Bronson, who soon after entered upon the premises and he and his grantees have since occupied and possessed the same under claim of title through that deed. The defendant holds the title conveyed by the Butler deed to Bronson.

The questions upon the facts occurring since the death of Henry Anderson are, first, whether, assuming the latter to have then had the legal and equitable estates in the land, the deeds from Peter Anderson, Sr., Goodman and Lucas to Butler conveyed to the latter the legal title which had been in Henry Anderson; or, second, whether their transactions with Butler raised an equity in his favor which, having been transmitted to the defendant, entitles him to the possession of the premises as against the plaintiff.

The first question, then, upon this part of the case is whether the trustees had authority under the will to declare the master's deed to Henry Anderson to be a mortgage and to deed the lands to Butler at the time when this was done. Having regard to the language of the testator, there is room for doubt whether the power given to the trustees in respect to the alienation of real estate extended beyond an authority to sell or mortgage the lands of the testator for the purpose of paying debts; that specific power is expressly granted
111 and the general language added might be thought to grant powers incidental to that main purpose. But we do not decide how this may be. No doubt the rule is that unless there is by the terms of its creation a limitation upon the duration of the trust, it will be held to endure so long as the purposes of the trust require. But when the duration of the trust is expressly limited, the authority of the trustee expires according to the limitation. 1 Perry on Trusts, Sec. 316. Says the author: "So trustees may take only a chattel interest in real estate, although limited to them and their heirs, as when they are to hold in trust only for a short time to pay debts and legacies and to convey it to the cestui que trust when he comes of age, or at a certain time." And see among the cases there cited Goodlittle v. Whitby, 1 Burr. 228; Stanley v. Stanley, 16 Wis. 491; Pearce v. Savage, 45 Me. 80; and also Powell v. Glenn, 21 Ala. 458; and Smithwick v. Wintersmith, 12 Ky. L. Rep. 380.

Here the testator directed that the trustees should deliver a settlement of their trust to each of his sons on their reaching the age of twenty-one, respectively, and then put him in possession of one-half

of the property, except that there might be a reservation of a fraction of the moiety until the sons should respectively arrive at the age of twenty-five, when the remaining part should be turned over to them. James, the youngest of the sons, arrived at the age of twenty-five on June 25, 1856, nearly four years before the trustees deeded the lands to Butler. No account can be taken of the fact that the deeds were prepared in 1855. They had no effect until they were delivered in 1860. It is stated in the brief of counsel that they were in escrow in the meantime, but it is not one of the stipulated facts nor found by the court; nor indeed was there any competent evidence tending to prove such fact. In these circumstances we think the duration of time for the active duties of the trustees was limited to the time when they were required to make their settlement with the beneficiaries and turn over to them the trust property. This is admitted by counsel for defendants in error, who say in their brief:

112 "The language of the will makes it entirely clear, we think, that the testator contemplated that the trustees should in any event fully perform and discharge their trust by the time the youngest son had reached the age of twenty-five years, and that at this date, at latest, the title of the trustees should cease and determine."

It follows that the deeds to Butler, so far as they are regarded as deeds of the trustees, conveyed no title, for the trust had been extinguished several years before. No judicial act was required to terminate the trust as would be necessary in the case of an executor. The testator had also appointed executors, whose powers would continue so long as the estate remained unsettled in the probate court, and the continuance of the term of the trust was not necessary. They were the same persons as those created trustees, but their relations to the estate were the same as if they had been different persons. It was not a case where the trust is imposed upon the executors as such. 1 Lewin on Trusts, Sec. 206; Herron v. Comstock, 139 Fed. 370, 377, and the cases there cited. The distinction is also referred to by Mr. Justice Gray in McArthur v. Scott, 113 U. S. 340, 377. When the trust expired the legal title became vested in James H. Anderson. The executors might in certain circumstances sell and convey the lands of the testator, as, for instance, to pay debts. But this would require an order of the probate court upon notice to the parties interested.

The second question is whether the transactions between the trustees and Butler were such as to raise an equity in his favor which, being transmitted to the defendant, entitles him to retain the possession of the land as against the plaintiff's legal title. For if the defendant has an equity which thus entitles him, the plaintiff cannot recover. It was so held in Cincinnati v. White, 6 Peters 431. To the same effect is Dickerson v. Colgrove, 100 U. S. 582. But we are unable to discover any grounds on which it could be claimed that any equity was created for Butler by his transactions with the trustees. It is unnecessary to say he was conscious of wrong-doing, for he may have conceived that the legal effect of the foreclosure proceedings left Henry Anderson in the position of a trustee for him in

113 respect to the lands; but his course was taken entirely in his own interest and was prejudicial to the estate. The trustees

were induced by his representations to treat the master's deed to Henry Anderson as a mortgage, when in fact it was not. The sons were induced by appeals to filial sentiment to make admissions the truth of which was taken on trust and these admissions were adopted by the trustees as the basis of their dealings with Butler. The money which he paid to them, as trustees, upon his note was not much, if any, more than was sufficient to pay it after crediting him with the proceeds of the Master's sale. He based his action in making the sale of the property upon his supposed success in acquiring it. We desire to make no further comments upon the character of these transactions than the adjudication of the rights of these parties requires, but we cannot realize any basis on which to build up anything more than the strictly legal rights which Butler acquired therefrom.

It remains to be observed that if by Anderson's will an estate in remainder after the death of his surviving son was given to his lineal descendants, it was beyond the power of the tenants for life to defeat or prejudice the remainder-man by their own acts or admissions. The only way in which the remainder could have been destroyed would have been by the valid exercise of the power given to the trustees by the will.

The vigilance with which the court protects the estate in remainder for infants is illustrated by the case of McArthur v. Scott, above referred to, where the will which had created it had been vacated by a decree in a suit brought by an heir at law in which children contemplated by the will as sharers in the remainder, but yet unborn, were not represented, though all the living parties in interest having life estates were. It was held that the devise to those children was unaffected by the decree, and that their respective estates became vested upon the subsequent birth of each.

The judgment must be reversed with costs and a new trial awarded.

a

No. 1679.

United States Circuit Court of Appeals

SIXTH CIRCUIT.

PETER ANDERSON, Plaintiff in Error,

vs.

ROSEWELL E. MESSENGER, Defendant in Error.

Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

RECORD.

ORIGINAL TRANSCRIPT FILED APRIL 11, 1907.

1 TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, ss:

Record of the proceedings of the Circuit Court of the United States within and for the Western Division of the Northern District of Ohio in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the City of Toledo, in said District, on the first Tuesday in December, being the fourth day of said month in the year of our Lord one thousand nine hundred and six and of the Independence of the United States of America, the 131st, to-wit: on the 22nd day of December, A. D. 1906.

Present the Honorable Robert W. Tayler, United States District Judge.

Law. No. 1897.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

Said action was commenced on the 27th day of December, A. D. 1904, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, and orders of the court were made and entered in the order, and on the dates hereinafter stated, to-wit:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL MESSENGER, Defendant.

Petition.

Plaintiff says that he is a citizen and resident of the State of Tennessee, and the defendant is a citizen and resident of the county of Lucas, State of Ohio.

That this action is brought to recover possession of real estate situated in Lucas County, Ohio, the value of which exceeds, exclusive of costs, the sum of one hundred thousand ($100,000.00) dollars, and to recover damages amounting to ten thousand ($10,000) dollars.

First.

For a first cause of action against the defendant, plaintiff says that he has a legal estate in, is the owner in fee simple of, and is entitled to the immediate possession of the following described real estate, to-wit:

2 Lots numbered twenty (20), twenty-one (21) except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof, thirty (30), thirty-one (31), thirty-two (32), thirty-three (33) ten hundred and eight (1008), and ten hundred and nine (1009), all in the Vistula Division of the city of Toledo, county of Lucas, State of Ohio.

That said lots exceed $100,000.00 in value.

That the defendant unlawfully keeps the plaintiff out of the possession of said premises.

Second.

For a second cause of action against the defendant, plaintiff says that he is a citizen and resident of the state of Tennessee, and that the defendant is a citizen and resident of the county of Lucas, State of Ohio.

That since the sixteenth day of September, 1902, the plaintiff has had a legal estate in, has been the owner in fee simple of and is entitled to the use and possession of the following described real estate, to-wit:

Lots numbered twenty (20), twenty-one (21) except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof, thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), ten hundred and eight (1008), and ten hundred and nine (1009), all in the Vistula Division of the city of Toledo, county of Lucas, and State of Ohio.

That the defendant has been wrongfully keeping plaintiff out of the possession of said real estate, and has received the rents, issues and profits therefrom since the said 16th day of September, 1902. That by reason thereof, plaintiff has lost said rents and profits and has sustained damages by reason of the unlawful withholding of the possession of said property from plaintiff during said time, all of which is of the value and damage to plaintiff in the sum of ten thousand ($10,000.00) dollars.

Wherefore, plaintiff prays for judgment against the said defendant for the recovery of the possession of said premises, and also for said sum of $10,000.00, with interest thereon, and also for any rents and profits or damages which may accrue subsequently to the filing of this action, up to and including the time that judgment may be entered in favor of plaintiff. Plaintiff prays for costs and all other relief to which he may be entitled.

PETER ANDERSON,
By CHAS. A. THATCHER,
RHEA P. CARY,
His Attorneys.

STATE OF TENNESSEE,
Shelby County, ss:

Peter Anderson, being first duly sworn, says that he is the plaintiff in the above entitled action; that the allegations
3 contained in the foregoing petition are true as he verily believes.

PETER ANDERSON.

Subscribed in my presence and sworn to before me this the 24th day of December, A. D. 1904.

[NOTARIAL SEAL.] M. W. ALLEN,
Notary Public, Shelby County, Tennessee.

Precipe.

To the Clerk of the U. S. Circuit Court for the Northern District of Ohio, Western Division.

SIR: Issue Summons for the above named defendant addressed to the United States Marshal of this Court, returnable according to law. Endorse on the same "Action for money, amount claimed $10,000.00; and for the possession and delivery of real estate."

CHAS. A. THATCHER,
RHEA P. CARY,
Attorneys for Plaintiff.

Filed, Dec. 27, 1904. Irvin Belford, Clerk.

(Endorsement:) No. 1897. United States Circuit Court Northern District of Ohio, Western Division. Peter Anderson, Plaintiff, vs. Rosewell Messenger, Defendant. Petition. Filed, Dec. 27, 1904. Irvin Belford, Clerk. Charles A. Thatcher, Attorney & Counsellor, Toledo, Ohio.

In the Circuit Court of the United States, for the Western Division of the Northern District of Ohio.

Law Cause. No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL MESSENGER, Defendant.

Answer.

The defendant, Rosewell Messenger for his answer to plaintiff's petition and by way of first defense thereto says:

First Defense.

He admits that the plaintiff is a resident and citizen of the State of Tennessee; that this defendant is a citizen and resident of the

County of Lucas of the State of Ohio; that this action is brought to recover possession of real estate situate in Lucas County, Ohio, the value of which exceeds, exclusive of costs, the sum of one hundred thousand ($100,000) dollars, and to recover alleged damages amounting to ten thousand ($10,000) dollars.

That this defendant is in the possession and is now and has been keeping plaintiff out of the possession of the real estate described in plaintiff's petition, and has received the rents, issues and profits therefrom since the 6th day of September, A. D. 1902; but while admitting said allegations to be true this defendant denies each and all the other allegations contained in plaintiff's petition.

4 He specially denies that the plaintiff has a legal estate or any other title in the said real estate, or any part thereof.

He denies that the plaintiff is the owner in fee simple or otherwise of said real estate and he denies that the plaintiff is entitled to the possession of said real estate or any part thereof.

KING & TRACY.
CLAYTON W. EVERETT.
Attorneys for Defendant.

STATE OF OHIO,
Lucas County, ss:

The defendant, Rosewell Messenger being first duly sworn says that the allegations contained in the foregoing answer are true as he verily believes.

ROSEWELL E. MESSINGER.

Sworn to before me and subscribed in my presence this 20th day of January, A. D. 1905.

[NOTARIAL SEAL.] WM. B. DUCK,
Notary Public, Lucas County, Ohio.

(Endorsement:) Law Cause No. 1897. In the Circuit Court of the United States for the Western Division of the Northern District of Ohio. Peter Anderson, Plaintiff, vs. Rosewell Messenger, Defendant. Answer. Filed, Jan. 20, 1905. Irvin Belford, Clerk. King & Tracy and Clayton W. Everett, Attorneys for Defendant.

June Term, A. D. 1906, to-wit; September 11, 1906.

Present the Honorable John E. McCall, U. S. District Judge, sitting by designation.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

This cause having been removed from this court to the United States Circuit Court of Appeals for the Sixth Circuit, by Writ of

Error of the plaintiff from the decree entered in this court in the above entitled action on the 28th day of June, 1905, in favor of said defendant and against said plaintiff. And the said United States Circuit Court of Appeals having ordered and adjudged that the judgment of this court so appealed from be reversed with costs and with directions to award a new trial. And said United States Circuit Court of Appeals having remanded said cause to this court, as appears by mandate of said United States Circuit Court of Appeals, now here.

Now, on motion of the attorneys for said plaintiff, it is ordered that the said mandate be filed in this court and that the judgment of said United States Circuit Court of Appeals, be entered as the judgment of this court, to-wit: that the said judgment of this court entered on the 28th day of June, 1905, be and the same is hereby reversed, and a new trial awarded herein, and that the said plaintiff, Peter Anderson, recover against said defendant Rosewell E. Messenger, for his costs herein expended, taxed at $——— and have execution therefor.

June Term, A. D. 1905, To-wit, October 27, 1907.

Present the Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL MESSINGER

This cause is continued to the next term of this court.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Motion.

Now, comes the defendant, Rosewell E. Messinger, and moves the court for leave to withdraw from this case clause number nine of stipulation number one, being a stipulation dated June 1st, 1905, or the whole of said stipulation if the court thinks it more equitable and proper so to do, on the ground and for the reasons, viz:

1st. That said clause number nine of said stipulation so far as it relates to the delivery of the deed is untrue, was made under a mistake and misapprehension of the facts of the case and does great injustice to this defendant.

2nd. That said clause number nine of said stipulation was entered into on the mistaken supposition and belief that competent oral and written evidence existed, showing that said deed was delivered in October, 1855 either absolutely or in escrow, but it was afterwards ascertained and it was the fact that all the witnesses to the transaction were dead and the written evidence lost or destroyed, and said stipulation was made by the counsel of this defendant under said mistake of fact as to the existence of such evidence.

That on account of the death of said witnesses and the loss of said evidence, this defendant is compelled to rely on the presumption arising from and created by the deeds and documents in the transaction, and that said stipulation nullifies the presumptions created by the said deed and documents and in effect destroys this deefndant's evidence as to the delivery of said deed.

KING & TRACY,
O. B. SNIDER,
CLAYTON W. EVERETT,
Attorneys for Defendant.

6 STATE OF OHIO,
Lucas County, ss:

The defendant, Rosewell E. Messinger, being first duly sworn according to law, says that the facts and statements contained in the foregoing motion are true as he verily believes.

ROSEWELL E. MESSINGER.

Sworn to before me and subscribed in my presence this 30th day of October, A. D., 1906.

[NOTARIAL SEAL.] GEO. D. WELLES,
Notary Public, Lucas County, Ohio.

(Endorsement): No. 1897. In the Circuit Court of the United States for the Northern District of Ohio, Western Division. Peter Anderson, plaintiff, vs. Rosewell E. Messinger, defendant. Motion. Filed Oct. 31, 1906. Irvin Belford, clerk. U. S. Circuit Court, N. D. O. O. B. Snider, Clayton W. Everett and King & Tracy, attorneys.

December Term, A. D., 1906, to-wit, December 4, 1906.

Present: The Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL MESSINGER.

This day duly came on for hearing the motion of the defendant, Rosewell E. Messinger, to withdraw section nine of written stipulation number one, heretofore filed herein; and thereupon came the

parties, by their respective attorneys; and said motion having been duly heard, and having been argued by counsel and duly submitted, the court being fully advised in the premises, finding that in the furtherance of justice said motion should be granted, on consideration does hereby grant same.

It is therefore hereby ordered that the defendant, Rosewell E. Messenger, be and he hereby is granted leave to withdraw said section nine of said stipulation number one, heretofore filed herein, from the files in this action, and that thereupon the plaintiff, Peter Anderson, and the defendant, Rosewell E. Messinger, and each of them, be fully and forever, relieved, released, and discharged from the provisions of said section nine of said stipulation number one, and that said section be thereupon annulled and of no force or effect whatsoever; to which ruling and order of the court said plaintiff, Peter Anderson, by his attorneys, then and there duly excepted.

And thereupon said defendant, Rosewell E. Messinger, by his attorneys, in open court, in pursuance of said order, withdrew said section nine of said stipulation number one from the files
7 herein. And it is therefore ordered that said section nine of said stipulation be and is annulled and of no further force or effect whatever; to which action of said defendant and said order of the court, said plaintiff, by his attorneys, then and there duly excepted, and plaintiff is granted leave to file a bill of exceptions within 60 days.

December Term, A. D., 1906, to-wit, December 5, 1906.

Present: The Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL MESSINGER.

This day came the parties herein by their attorneys; also came the following named persons as jurors, to-wit: E. J. Barr, B. F. Casebeer, W. E. Cummings, C. S. Elder, W. S. Gehrett, John Haese, Daniel Hager, Geo. E. Hedges, Thomas Kinney, James Pettit, Wm. Pontius, George Rentz, who were duly impaneled and sworn, according to law; and thereupon the case came on for hearing on the pleadings and evidence. And after hearing the evidence for both plaintiff and defendant, thereupon both plaintiff and defendant moved the court to arrest the testimony from the jury and for judgment, and the argument of counsel being heard in part the cause was continued until to-morrow morning at 9 o'clock.

December Term, A. D., 1906, to-wit, December 6, 1906.

Present: The Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL MESSENGER.

This day again came the said parties by their attorneys and also came the jury heretofore impaneled and sworn, and the trial proceeded. And further arguments upon the motion to arrest the testimony from the jury being heard, this cause was continued until Monday morning, December 10, 1906.

December Term, A. D., 1906, to-wit, December 10, 1906.

Present: Then Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL MESSENGER.

This day again came the parties, by their attorneys, and also came the jury heretofore impaneled and sworn, and the trial proceeded. And the said jury having heard further testimony,
8 the hearing of this case was continued until Wednesday morning, December 12, 1906, at 9 o'clock.

December Term, A. D., 1906, to-wit, December 12, 1906.

Present: The Honorable Robert W. Tayler, U. S. District Judge

No. 1897. Law.

PETER ANDERSON
vs.
ROSWELL MESSENGER.

This day again came the said parties, by their attorneys and also came the jury heretofore impaneled and sworn, and the trial proceeded. And said jury having heard the remaining testimony, and a part of the argument of counsel, the further hearing of this case was continued until to-morrow morning at 9:30 o'clock.

December Term, A. D., 1906, to-wit, December 13, 1906.

Present: The Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL MESSENGER.

This day again came the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn and the trial proceeded. And the said jury having heard further argument of counsel the further hearing of this case was postponed until to-morrow morning at 9 o'clock.

December Term, A. D., 1906, to-wit, December 14, 1906.

Present: the Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL MESSENGER.

This day came again the said parties by their attorneys, and also came the jury heretofore impaneled and sworn, and the trial proceeded. And the said jury having heard the remaining arguments of counsel, the further hearing of this case was continued until Monday morning, December 17, 1906.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Be it remembered that this cause came on to be heard upon the written motion of the defendant to be relieved from section 9 of stipulation number 1, herein filed and offered in evidence herein, which motion was filed herein on the 31st day of October, 1906, and which is in the words and figures following, to-wit:

9 (The clerk here copy the motion filed on the 31st day of October, 1906, and endorsed "Motion, filed Oct. 31," 1906,) hereto attached, marked Exhibit No. 1.

EXHIBIT No. 1.

"In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Motion.

Now comes the defendant, Rosewell E. Messinger, and moves the court for leave to withdraw from this case, clause number nine of stipulation number one, being a stipulation dated June 1st, 1905, or the whole of said stipulation if the court thinks it more equitable and proper so to do, on the ground and for the reasons, viz:

1st. That said clause number nine of said stipulation so far as it relates to the delivery of the deed is untrue, was made under a mistake and misapprehension of the facts of the case and does great injustice to this defendant.

2nd. That said clause number nine of said stipulation was entered into on the mistaken supposition and belief that competent oral and written evidence, existed, showing that said deed was delivered in October, 1855, either absolutely or in escrow, but it was afterwards ascertained and it was the fact that all the witnesses to the transaction were dead and the written evidence lost or destroyed, and said stipulation was made by the counsel of this defendant under said mistake of fact as to the existence of such evidence.

That on account of the death of said witnesses and the loss of said evidence, this defendant is compelled to rely on the presumption arising from and created by the deeds and documents in the transaction, and that said stipulation nullifies the presumption created by the said deed and documents and in effect destroys this defendant's evidence as to the delivery of said deed.

KING & TRACY,
O. B. SNIDER,
CLAYTON W. EVERETT,
Attorneys for Defendant.

STATE OF OHIO,
Lucas County, ss:

The defendant, Rosewell E. Messinger, being first duly sworn according to law, says that the facts and statements contained in the foregoing motion are true as he verily believes.

ROSEWELL E. MESSINGER.

10

Sworn to before me and subscribed in my presence this 30th day of October, A. D., 1906.

[NOTARIAL SEAL.]

GEO. D. WELLES,
Notary Public, Lucas County, Ohio.

(Endorsement): No. 1897. In the Circuit Court of the United States for the Northern District of Ohio, Western Division. Peter Anderson, plaintiff, vs. Rosewell E. Messinger, defendant. Motion. Filed Oct. 31, 1906, Irvin Belford, clerk, U. S. Circuit Court, N. D. O. O. B. Snider, Clayton W. Everett and King & Tracy, Attorneys."

The defendant offered and read in support of said motion the affidavits of Willard Parker Butler, Emily O. Butler and Oliver B. Snider, which affidavits are in the words and figures following, to-wit:

(The clerk will here copy the affidavits of Willard Parker Butler, Emily O. Butler, and Oliver B. Snider, marked, filed 10th day of November, 1906) hereto attached, marked Exhibit No. 2.

EXHIBIT No. 2.

"The Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Affidavit of Willard Parker Butler

STATE OF NEW YORK,
County and City of New York, ss:

Willard Parker Butler being first duly sworn, says he is a resident of Essex Falls, Essex County, New Jersey that he is a member of the Bar of the State of New York, and a member of the law firm of Whitridge, Butler and Rice, having its office at 59 Wall Street in said city; that he is a great nephew of Charles Butler, deceased, late of said city, and that from about the year 1882 up to the date of his death, on December 13, 1897, he, affiant, was familiar with the business affairs of said Charles Butler, and since his death has been familiar with the affairs of his estate having been the legal adviser of Emily O. Butler, the only surviving child of said Charles Butler.

That at the time stipulation No. 1, between the parties in the above entitled action, was entered into, dated June 1, 1905, he believed, and so informed the counsel for defendant who were then present at his office in New York City, that he could probably find among the

papers and effects of said Charles Butler sufficient evidence to show that the deed of the executors of Henry Anderson to Charles
11 Butler, dated October 1, 1855, for the Toledo Ohio, property involved in this action, was duly delivered, either in escrow or absolutely, on or about the day of its date, but affiant says that since said stipulation was entered into on June 1, 1905, he has made further careful and thorough personal search and investigation and has caused like search and investigation to be made by others among the effects of said Charles Butler, and has caused the officials of the Manhattan Bank of said city of New York to make a like serach and investigation among its books, papers and records, but neither he nor they have been able to obtain any further information or evidence on the subject.

WILLARD PARKER BUTLER.

Sworn to before me and subscribed in my presence this 3rd day of November, 1906.

[NOTARIAL SEAL.]

JOHN FRENCH,
Notary Public, New York County.

(Endorsement). The Circuit Court of the United States for the Northern District of Ohio, Western Division. Peter Anderson, vs. Rosewell E. Messinger. No. 1897. Affidavit of Willard Parker Butler. Dated Nov. 3, 1906. Filed, Nov. 10, 1906, Irvin Belford, Clerk, U. S. Circuit Court, N. D. O. C. W. Everett, King & Tracy, and O. B. Snider, Attorneys for Defendants."

EXHIBIT No. 2.

"The Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Affidavit of Emily O. Butler.

STATE OF NEW YORK,
County and City of New York, ss:

Emily O. Butler being first duly sworn, says she is a resident of Scarsdale, Westchester County, in said State of New York, and that she is the only living child of Charles Butler, deceased, late of said city of New York; that since stipulation No. 1 herein was made on June 1, 1905, she has made diligent search and has requested her counsel, Willard Parker Butler, to have a diligent search made along the papers and effects of said Charles Butler and by the Manhattan Bank of said city of New York, among the books, papers and records

of said bank, for evidence showing the date of the delivery of the deed of Peter Anderson and Walter Goodman, executors of the will of Henry Anderson, deceased, to said Charles Butler, for the Toledo, Ohio, property, involved in this action, dated on or about
12 October 1, 1855, and that she has been unable to find anything bearing on the subject.

EMILY O. BUTLER.

Sworn to before me and subscribed in my presence this 3rd day of November, 1906.

[NOTARIAL SEAL.]

JOHN FRENCH,
Notary Public, New York County.

(Endorsement:) The Circuit Court of the United States for the Northern District of Ohio, Western Division. No. 1897. Peter Anderson, vs. Rosewell E. Messinger. Affidavit of Emily O. Butler. Dated November 3, 1906. Filed, Nov. 10, 1906. Irving Belford, Clerk, U. S. Circuit Court, N. D. O. C. W. Everett, King & Tracy, and O. B. Snider, attorneys for Defendant.

EXHIBIT No. 2.

"The Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff.
vs.
ROSEWELL E. MESSINGER, Defendant.

Affidavit of O. B. Snider.

STATE OF OHIO,
Lucas County, ss:

O. B. Snider being first duly sworn, says he was present at the time Stipulation Number One, in the above entitled action, was signed, on June 1, 1905, at the office of Whitridge, Butler and Rice, 59 Wall Street, New York City; that at the time a very great many letters, letter-press books, deeds and other writings, all supposed to have a bearing on the issues in this case, were presented to affiant and associate counsel for identification and to be brought to Toledo, Ohio, for use in the trial of this action thereafter to take place; that all of said letters, letter-press books, deeds and other writings, being voluminous, were and could not then be fully and carefully examined.

Affiant further says that before and at the time said stipulation was signed that Mr. Willard Parker Butler, relative of and one of the counsel for Emily O. Butler, sole heir of Charles Butler, deceased, stated that in a further examination thereafter to be made by him, among the effects of said Charles Butler and in the several trunks

then in the office of said Willard Parker Butler, and pointed out to counsel engaged in the case, as containing books and papers left by said Charles Butler, that he would probably be able to find sufficient evidence to show that the deed of Walter Goodman and Peter Anderson, executors of Henry Anderson, to Charles Butler, dated on or about October 1, 1855, for the Toledo property involved in
13 this action, was duly delivered in October of that year; and affiant at that time understood and fully believed that in the letters, books, and documents sent to Toledo, as aforesaid, and from what was indicated in certain of the letters written by Charles Butler to Henry Anderson's executors, copies of which affiant had seen, and from what said Willard Parker Butler had said, that evidence would be found showing a delivery of said executors' deed to Charles Butler in October, 1855, as above mentioned; and affiant further says that paragraph number nine of said stipulation referring to such deed was entered into upon that understanding and belief, but it now transpires that a mistake was made as to this fact, and no evidence can be found, after diligent search therefor, to show the date of such delivery.

O. B. SNIDER.

Sworn to before me and subscribed in my presence this 7th day of November, 1906.

[NOTARIAL SEAL.] JAS. HARRINGTON BOYD,
Notary Public, Lucas County, Ohio.

(Endorsement:) The Circuit Court of the United States for the Northern District of Ohio, Western Division. Peter Anderson, vs. Rosewell E. Messinger, No. 1897. Affidavit of O. B. Snider, dated November 7, 1906. Filed, Nov. 10, 1906, Irvin Belford, Clerk, U. S. Circuit Court, N. D. O. C. W. Everett, King & Tracy and O. B. Snider, Attorneys for defendant."

The defendant further offered and there was received in evidence the professional statement of Harry E. King, made as upon affidavit, with the consent of plaintiff, which statement was in substance the same as the affidavit of Oliver B. Snider, above set out.

Defendant also offered and read &c. (Ex. A.) hereto attached and hereby made part hereof.

"Exhibit A," made part of the foregoing bill of exceptions.

Defendant also offered and read in evidence upon said hearing and in support of said motion, a deed dated October 1, 1855, from Peter Anderson and Walter Goodman, and the acknowledgment thereof found on page twenty-seven and following of the former record in this case and known as "Exhibit B" therein, being the same deed referred to in Section Nine in said stipulation number 1.

The clerk will copy said deed and acknowledgment as part of this bill of exceptions.

14 "EXHIBIT B."

This Indenture, made on the first day of October, in the year of our Lord one thousand eight hundred and fifty-five, Between Peter Anderson and Walter Goodman, both of Holly Springs in the State of Mississippi, Trustee and Executors under the last Will and Testament of Henry Anderson late of Holly Springs in said State, deceased, of the first part, and Charles Butler of the city of New York, in the State of New York of the second part, Witnesseth, that the said parties of the first part, by virtue of the power and authority to them given in and by the said last Will and Testament, and for and in consideration of the sum of one dollar (and other considerations) lawful money of the United States of America, to them in hand paid, at or before the ensealing and delivery of these presents, by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs and assigns forever released and discharged from the same by *there* presents, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by *there* presents do grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, his assigns forever. All those certain lots or parcels of land situate lying and being in the Vistula division of the city of Toledo, County of Lucas, State of Ohio known and designated as lots numbers Eighteen (18) Nineteen (19) Twenty (20) twenty-one (21) one thousand and eight (1008) one thousand and nine (1009) thirty (30) thirty-one (31) thirty-two (32) thirty-three (33) thirty-four (34) one thousand (1000) one thousand and one (1001) said lots being in one block bounded Northerly by Summit street, Southerly by Water street, Easterly by Cherry Stree- and Westerly by Lynn Street, also Water Lot number nine hundred and ninety-two (992) extending from Water street to the line of wharfing and fronting on the Miami River one hundred and seventy-six feet and sixty-five hundredths of a foot also town lots in the Port Lawrence division of said city of Toledo numbered one hundred and eighty-five (185) one hundred and seventy-[illegible] (176) one hundred and eighty-eight (188) two hundred and ninety-eight (298) one hundred and fifty-seven (157) forty-eight (48) two hundred and forty-six (246) two hundred and sixty-two (262) two hundred and eighty-six (286) three hundred and four (304) three hundred and thirty-two (332) three hundred and thirty-three (333) three hundred and thirty-six (336) three
15 hundred and thirty-seven (337) and three hundred and thirty-eight (338) as the same were laid out and numbered on the recorded map of said city, being the same premises conveyed by Edson Allen, Master Commissioner in Chancery, to Henry Anderson by deed dated the eighteenth November, one thousand eight hundred and forty-four.

Together with all and singular the edifices, buildings, rights, members, privileges, advantages, hereditaments and appurtenances to the same belonging, or in any wise appertaining; and the re-

version and reversions, remainder and remainders, rents, issues and profits thereof. And also, the estate right, title, interest, claim and demand whatsoever, both in law and equity, which the said testator had in his lifetime and at the time of his decease, and which the said parties of the first part, or either of them, have or hath, by virtue of the said last will and testament, or otherwise, of, in, and to the same, and every part and parcel thereof, with the appurtenances; to have and to hold the said premises above mentioned and described, and hereby granted and conveyed, or intended so to be, with the appurtenances, *under* the said party of the second part, his heirs and assigns, to his and their *only* proper use, benefit and behoof forever. It being understood that the above described premises were conveyed to Henry Anderson in fee but held by him in his life time as a mortgage to secure the payment of a certain sum of money due from Charles Butler to Henry Anderson which fact, after his death was duly acknowledged under seal by William Anderson and James H. Anderson his only heirs at law; said parties of the first part covenant, grant, promise and agree to and with the said party of the second part his heirs and assigns, that the said party of the second part, his heirs and assigns, shall and lawfully may from time to time, and at all times for ever hereafter, peaceably and quietly, have, hold, use, occupy, possess and enjoy, all and singular the said hereditaments and premises hereby granted and conveyed, or intended so to be, with their and every of their appurtenances, and receive and take the rents, issues and profits thereof, to and for his and their own use and benefit, without any lawful let, suit, hindrance, molestation, interruption or denial whatsoever, of, from, or by them the said parties of the first part, or their assigns; or, of, from, or by any other person or persons whomsoever lawfully claiming, or who shall or may lawfully claim hereafter, by, from or under them or either of them, or by, from or under their heirs or assigns any right, title, interest or estate; and that free and clear, and freely and clearly discharged, acquitted and exonerated, or otherwise well and sufficiently
16 saved defended, kept harmless and indemnified by them the said parties of the first part, their heirs and assigns, of, from and against all and all manner of former and other gifts, grants, bargains, sales, mortgages, judgments and all other charges and incumbrances whatsoever, had, made, committed, executed or done by them the said parties of the first part, or by, through, or with their acts, deeds, means, consent, procurement or privity.

In witness whereof, the said parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

P. ANDERSON. [SEAL.]
Ex. & Trus.s &c.
W. GOODMAN. [SEAL.]
Ex'r and Trustee under the Will of H. Anderson, Dec'd.

Sealed and delivered in the presence of,
FINLEY I. WRIGHT,
S. H. FLEETWOOD.

STATE OF NEW YORK,
City and County of New York, ss:

On this ninth day of October eighteen hundred and fifty-five before me a commissioner for said state appointed by the Governor of the State of Ohio to take acknowledgments of deeds to be recorded in said State of Ohio, personally came Peter Anderson and Walter Goodman to me known to be the grantors described in and who executed the within deed and severally acknowledged the signing and sealing of said deed as their voluntary act.

In witness whereof, I have hereunto subscribed my name and affixed my official seal.

STANLEY H. FLEETWOOD,
[SEAL.] *Commissioner,*

(Endorsed:) Peter Anderson & Walter Goodman, Trustees & Executors of Henry Anderson, Dec'd, to Charles Butler. Dated 1st Octo. 1855. Deed Lots in Toledo.

Recorder's Office Lucas Co. Rec'd. for record May 2nd, 1860 & Recorded May 24, 1860 in Vol. 34 of Deeds pages 110, 111 & 112, Jonathan Wynn, Recorder. Fees $1.35.

The plaintiff offered and read in evidence upon the hearing of said motion, the following letters from Charles Butler, to-wit:

(The Clerk will here copy letters of March 2, 1860, and Feb. 26, 1850, which are marked Exhibits 45 and 49, respectively, and attached to the original bill of exceptions, filed herein August 2nd 1905 hereto attached marked Exhibit No. 3.)

17 45.

No. 12 WALL STREET,
NEW YORK, *2nd March*, 1860

W. Goodman.

MY DEAR SIR: I have just received your letter of the 22nd Feb. After I had written to you on the 9th Mr. Brunson, the party who was negotiating with me for the Toledo property, came to New York and wanted to negotiate for the entire block instead of part of it as had been talked of, after three days' constant work at it we concluded a bargain the details of which I have communicated to you, for the whole block at $17,500, but he became uneasy about the situation of the title and would not agree to pay any money till I was prepared to give him a good deed with certificate of title. I enclose a copy of the clause in the agreement between us that you may understand perfectly the great importance to me of having the deed now lying in the Manhattan Bank in escrow delivered to me that I may make a proper deed of warranty to Mr. Brunson as early as practicable that he may have no possible excuse for backing out which would not be serious to us all.

I also hand you copy of the account as finally settled on 1 October, 1851, by you and Mr. Anderson, and which we had before us on 1 October, 1855, you and Mr. Anderson being then here and at which

date you executed the deed and lodged it in escrow with W. S. Halstead of Manhattan Bank to be delivered to me on the order of either of you.

Since then the only payment made was of $4,000 to Peter Anderson on 1 January, 1857, of which you have also a statement, as you recollect. I hold his draft paid by me for it. By the terms of the agreement with James made in 1852 after he came of age as you recollect, I was to pay 6 per cent interest. In the fall of 1855 when we had the final settlement here I agreed to pay 7 per cent after that date and I have so computed the amount making $9183.88 on 1 January last. This of course is simple interest and is in accordance with our understanding.

If you will give me an order on Mr. Halstead for the deed I will lodge with him a stipulation to pay over the money to be received from Mr. Brunson on the first of May (the $2000 and interest on it from 26 Dec. last) and also to place with him the bond and mortgage or notes and mortgage which I am to take from Mr. Brunson for $15,000 duly signed by me to James H. Anderson as collateral security for the payment of the balance due from me. I want to place the papers at the earliest day practicable in the hands of the lawyer, M. R. Waite, esq., of Toledo, whose certificate of title
18 I am bound to furnish to Mr. Brunson. Of course there is no transfer of title til- the whole thing is consum-ated.

Please give your attention to this to aid me in perfecting this sale which I have labored to accomplish to effect the payments to Mr. Anderson.

I will write you on other matters in another letter.

In haste, truly yours,

CHARLES BUTLER."

49.

No. 12 Wall St.,
New York, 25 *Feby* 1860.

My Dear Sir: Enclosed I hand you copy of letter to James H. Anderson relative to the sale of my Toledo property which I have accomplished after a great deal and very protracted negotiations dating back to last spring, and to a most excellent, prompt and responsible purchaser. He is one of the most largest tobacco manufacturers in the west, and his capital is embarked in that. He intends to proceed immediately on obtaining his title to improve the property and to erect extensive buildings. He holds my contract to make a good title on or before the 1st May on which he pays $2000 and int. to that date on it. Another pay't will be made on 20th July of $456 and on the 20th January following $2,465.

I am to take his bond and mortgage for the balance of $15,500 on the first of May, which bond and mortgage I will assign and deposit with Mr. C. O. Halstead in Manhattan Bank. The deed to me you will recollect is in Mr. Halsteads' hands in escrow, deposited by you some years ago, and this I shall have to have delivered to me to enable me to make my warrantee deed to Mr. Brunson; and now my dear sir you will see the importance of this matter to me and of you-

co-operation to enable me to close with Mr. Brunson, and the sooner the better.

He will pay the money as soon as he can get the title on receiving 15 days' notice. I should despair of finding another purchaser at so good a price in ten years again if this should fail me. The amount of principal and interest due from me is a little over $9,000 on the first of January instant. The amount of this sale is $17,500, the cash payment to be immediately paid James, and the bond and mortgage assigned. I should add that the water lot is not included in my sale. That is in dispute in respect to title and quantity, and having no improvement on it is of very little value, and could not be sold for anything, nor could I make title to it.

I hope to see you here in March or April and beg that you will aid me in closing this sale. I want the deed as soon as I can
19 get it, and this can only be delivered on your order. My stipulation is to have all the papers at Toledo on or before the first of May, and my plan would be to have them all here in the hands of my counsel, M. R. Waite, Esq., to be delivered and put on record simultaneously on payment of the $2,000, and the execution and delivery of the bond and mortgage by Mr. Brunson. Mr. Waite can also act for you and receive the money and take the bond and mortgage if you desire, but I presume you would consider me your agent for that purpose.

Please let me know at what time you expect to come on north, and what, if anything more, is required of me before you leave home.

In haste, dear sir,

Truly yours,

CHARLES BUTLER

H. Goodman, Esq., Holly Springs, Miss.

Contract 20th Feb. 1860, *for Sale of Entire Block* $17,500.

Charles Butler
to
Calvin Brunson.

Payable $2000 "on" delivery of deed on or before 1st May with abstract and certificate of M. R. Waite of good title and balance $15,500 in annual payments from 20th January 1860 of $2000 each. Interest semi-annually 20th January, 6 per cent on whole sum due payable in sight exchange of New York.

C. B."

The foregoing was all of the evidence introduced and received upon said hearing.

On consideration of said motion and the evidence as set out above, the court ordered that said motion be allowed and granted, and that the defendant be relieved from said clause of said stipulation and the same was accordingly so done.

To such action of the court the plaintiff at that time duly excepted and here and now tenders this bill of exceptions to the action

of the court in the premises, which is approved and allowed, and hereby signed, sealed and made a part of the record in this cause.

Witness the signature of the judge of said court this 15th day of December, 1906

R. W. TAYLER,
Judge of the Circuit Court of the United States, for the Northern District of Ohio, Western Division.

(Endorsement:) 1897. Peter Anderson vs. Rosewell Messenger. Bill of Exceptions on Ruling on Motion. Filed, Dec. 15, 1906. Irvin Belford, Clerk, U. S. Circuit Court, N. D. O.

December Term, A. D. 1906, to-wit: December 15, 1906.

Present the Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

This day came the plaintiff and presented to the court his certain Bill of Exceptions taken upon the order of the court upon the motion heretofore filed by the defendant herein, which bill of exceptions is approved and allowed, signed and sealed and hereby ordered to be made a part of record in this cause.

December Term, A. D. 1906, to-wit: December 17, 1906.

Present the Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

This day again came the said parties, by their attorneys and also came the jury heretofore impaneled and sworn and the trial proceeded. And the said jury having heard the charge of the court, under and by direction of the court, return their verdict in writing, signed by their foreman and say: "We, the jury in this case, being duly impaneled and sworn, under and by direction of the court, do find upon the issues joined, for the defendant. W. S. Gehrett, Foreman."

It is therefore considered by the court that the defendant Rosewell Messenger, go hence without day, and recover from the plaintiff, Peter Anderson his costs herein expended.

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, ss:

In the Circuit Court of the United States, December Term, A. D. 1906.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL MESSENGER, Defendant.

Verdict.

We, the jury in this case, being duly impaneled and sworn, under and by direction of the court, do find upon the issues joined, for the defendant.

W. S. GEHRETT, *Foreman.*

(Endorsement:) No. 1897. Peter Anderson vs. Rosewell Messinger. Verdict. Filed, Dec. 17, 1906. Irvin Belford, Clerk, U. S. Circuit Court, N. D. O.

21 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL MESSENGER, Defendant.

Motion for New Trial.

Now comes the plaintiff and moves the court to set aside the verdict of the jury and grant a new trial herein, for the following reasons:

(1) The court erred in directing the jury to return a verdict for the defendant.

(2) The court erred in overruling plaintiff's motion to direct the jury to return a verdict for the plaintiff.

(3) The verdict of the jury is not sustained by sufficient evidence.

(4) The verdict of the jury is against the weight of the evidence.

(5) The verdict of the jury is contrary to law.

(6) Error of law recurring at the trial excepted to by plaintiff.

(7) The court erred in excluding evidence offered by plaintiff to which plaintiff duly excepted.

(8) The court erred in receiving evidence offered by defendant over the objections of plaintiff, to which plaintiff duly excepted.

PETER ANDERSON, *Plaintiff.*
By RHEA P. CAREY.
C. H. TRIMBLE.
C. A. THATCHER.
His Attorneys.

(Endorsement:) 1897. In the Circuit Court of the United States for the Northern District of Ohio, Western Division. Peter Anderson, Plaintiff, vs. Rosewell E. Messinger, Defendant. Motion for New Trial. Filed, Dec. 19, 1906, Irvin Belford, Clerk, U. S. Circuit Court, N. D. O. Charles A. Thatcher, Attorney & Counsellor, Toledo, Ohio.

December Term, A. D. 1906, to-wit; December 22, 1906.

Present the Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL MESSENGER, Defendant.

On the 5th day of December, 1906, came the plaintiff Peter Anderson, by Messrs. Rhea P. Cary, Charles H. Trimble and Charles A. Thatcher, his attorneys, and the defendant, Rosewell E. Messinger, by Messrs. King & Tracy, Clayton W. Everett and Oliver B. Snider, his attorneys; and thereupon this cause came on for trial; and a jury being called one came to-wit:

E. J. Barr, B. F. Casebeer, W. E. Cummings, C. S. Elder, W. S. Gehrett, John Haese, Daniel Hager, George E. Hedges, Thomas Kinney, James Pettit, William Pontius and George Reutz.

And said jury having been duly empaneled and sworn, and said cause having been duly heard and submitted upon the pleadings and the evidence; and thereupon, at the conclusion of all of the evidence, the defendant moved the court to instruct the jury to render a verdict in favor of defendant; and thereupon the plaintiff also moved the court to instruct the jury to render a verdict in favor of plaintiff; and thereupon the court overruled said motion of the plaintiff, to which plaintiff then and there duly excepted, and granted said motion of defendant to the granting of said motion plaintiff duly excepted and the court then instructed the jury to render a verdict in favor of defendant, to each and all of which orders (action) and directions plaintiff then and there in open court, duly excepted; and in pursuance of said direction, said jury, on December 17th, 1906, duly returned a verdict as follows:

"We the jury in this case, being dul yimpaneled and sworn, under and by direction of the court, do find upon the issues joined, for the defendant. W. S. Gehrett, Foreman."

On December 22, 1906, this cause duly came on for hearing upon the motion of the plaintiff for a new trial herein; and the court having heard the arguments of counsel thereon, on consideration overrules said motion, to which ruling the plaintiff, by his counsel, then and there duly excepted.

It is therefore considered, ordered and adjudged by the court that the defendant, Rosewell E. Messinger, go hence without day, and that said defendant recover his costs from said plaintiff taxed herein at $——; that execution issue therefor; that said plaintiff pay the costs

made by him and taxed by him at $—— and that execution issue therefor; to which decision and orders of the court, the plaintiff, by his counsel, then and there duly excepted.

Thereupon the court allows seventy-five days from the filing of this entry for the preparation, allowing, signing and filing of a bill of exceptions herein.

Plaintiff's Bill of Exception.

PETER ANDERSON, Plaintiff.
vs.
ROSEWELL MESSENGER, Defendant.

Be it remembered that on the trial of the above entitled
23 cause in the Circuit Court of the United States for the Northern District of Ohio, Western Division, at the December term, 1906, thereof, before the Honorable Robert W. Taylor, Judge of said court, and a jury, the following proceedings were had:

The plaintiff, to maintain the issues upon his part, offered and read in evidence the first eight sections of what is known as stipulation No. 1, which sections of said stipulation are in the words and figures following, to-wit:

"In the above entitled cause it is agreed by both parties that the following facts are true, namely:

"1st. That on the 19th day of May, A. D. 1838, at the time of the execution of the mortgage hereinafter mentioned on the land involved in this cause by Edward Bissell and his wife, Jane, A. M. Bissel, of the city of Toledo, Ohio, to Charles Butler, of the City and State of New York, that the said Edward Bissell was the owner in fee simple, had the legal title to and was entitled to and in the actual possession of the real estate described in said mortgage, including all of the real estate involved in this action and at the time of the execution of said mortgage there was and now is a regularly executed chain of conveyances in fee simple for said real estate from the government of the United States down to the said Edward Bissell.

"2nd. That on the 19th day of May, A. D. 1838, said Edward Bissell and Jane A. M. Bissell, of the City of Toledo, Ohio, signed, sealed, executed, acknowledged and delivered in due form of law to Charles Butler, of New York City, their mortgage deed of said date when and whereby they did duly grant, bargain, sell and convey to the said Charles Butler, his heirs and assigns forever in fee simple, among other lots and parcels of land, all of the real estate involved in this action to secure the payment of the bond of said Edward Bissell to the said Charles Butler executed on the same date for $21,500.00, payable at the office of the Manhattan Company of the City of New York, within one year from the date of said mortgage, with interest at the rate of seven per cent per annum, which mortgage was attested by two witnesses and was duly acknowledged according to law, which mortgage was afterwards duly filed for record May 19th, 1838, and recorded by the recorder of Lucas County, Ohio, on June 4th, 1838, on pages 267 and 269 inclusive of Volume No. 2, of the public record

of Mortgages kept and recorded in the recorder's office of Lucas County, Ohio.

That afterwards on September 23rd, A. D. 1841, the said Charles Butler made an assignment of said mortgage to said Henry Anderson in the words and figures following, to-wit, viz:

24 "'Assignment: I hereby assign this mortgage to Henry Anderson on certain trusts set forth in a deed this day made.

"'September 23rd, 1841. Charles Butler.'

"Which assignment was duly recorded on the margin of the record of said mortgage, in Lucas County, Ohio, on September 30th, A. D. 1843.

"3rd. That on the 19th day of September, A. D. 1843, said Henry Anderson claiming to be the assignee of said mortgage executed by said Edward Bissell and wife to said Butler filed his bill in Chancery in the Court of Common Pleas of Lucas County, Ohio, on the Chancery side of said Court to foreclose the aforesaid mortgage; the said Henry Anderson was complainant in said action and Edward Bissell, Jane A. M. Bissell, Frederick Bissell, Sidney Bissell and Charles Butler were named as defendants in said bill; that said Henry Anderson by his said bill alleged and set forth the execution by said Edward Bissell and Jane A. M. Bissell, his wife, of the said bond and mortgage, and the non-payment thereof and said bill in no way made any allegations against the said Charles Butler, except to allege the assignment of said mortgage by the said Charles Butler to the said Henry Anderson, in words and figures as follows:

"'Your orator further represents that on the 23d day of September in the year of our Lord 1841, the said mortgage and bond was duly transferred and assigned to your orator by the said Charles Butler.'

"The only prayer or relief asked for in said bill is in the words and figures following, to-wit, viz:

"'Your orator therefore prays that the writ of subpœna may issue against the said Edward Bissell, Jane A. M. Bissell, Charles Butler, Frederick Bissell and Laverett Bissell that they may be compelled to answer all and singular the premises, that an account may be taken of what is due to your Orator for his principal and interest aforesaid, that said Frederick Bissell, Sidney Bissell, Charles Butler, Jane A. M. Bissell may be forever barred and foreclosed of and from all right and equity of in and to said mortgaged premises and that your orator may have such other and further relief in the premises as equity and good conscience may require.'

"That all the defendants in said action, except Charles Butler, were either duly served with subpœna or entered their appearance in said action, but the said Charles Butler was not served with subpœna or other process, and in no manner entered his appearance in said action, and the said court in said action in no manner acquired jurisdiction over said Charles Butler; that afterwards on the first

25 day of April in the year A. D. 1844, a decree was duly entered in said action ordering the said premises to be advertised and sold according to law for the payment of the $29,139.01 found due the complainant Henry Anderson, on said bond and mortgage from the defendant Edward Bissell; and one Edson Allen, Master Commis-

sioner in Chancery in said court, was appointed to sell said premises, and that afterwards the said Master commissioner in pursuance of the decree of the court in said action sold the real estate involved in said action including all the real estate involved in this action to the complainant Henry Anderson at the price of $6,921.00, which sale was afterwards duly confirmed by the court and the said Edson Allen as said Master Commissioner making said sale was ordered by said court to convey said real estate in fee simple to the said purchaser, Henry Anderson, his heirs and assigns, forever, and that afterwards on the 18th day of November, 1844, the said Edson Allen as such Master Commissioner in pursuance of the decree rendered in said action of said sale and the confirmation thereof and in pursuance of the order of said court, did execute his Master Commissioner's deed to the said Henry Anderson dated the 18th day of November, 1844, whereby the said Master Commissioner conveyed to the said Henry Anderson, his heirs and assigns forever all the real estate involved in said action and all the real estate involved in this action, which deed was afterwards duly filed for record with the Recorder of Lucas County, Ohio, and by him duly recorded on page 158 of Volume 10 of the public record of deeds, kept in the Recorder's Office of Lucas County, Ohio.

"That all the proceedings in said foreclosure suit were regular and legal, excepting the failure or omission to serve Charles Butler with subpœna, or in some manner acquire jurisdiction as to him, which plaintiff does not admit to have been necessary.

"That the foregoing stipulation in this the 3d paragraph hereof, regarding the recitals in the pleadings and other proceedings, is subject to verification by the production by the defendant of duly certified copies of the record in said cause, unless the same is hereafter waived on the margin hereof by counsel for plaintiff.

"That the sale of said real estate by Edson Allen, Master in Chancery, as aforesaid, to Henry Anderson, was on the 24th day of September, A. D. 1844. That after said sale the said
26 Henry Anderson and Charles Butler entered into a written contract, a copy of which is hereto attached, marked 'Exhibit E' and made part hereof.

"4th. That Henry Anderson at the time of his death was a resident of Holly Springs, Marshall County, of the State of Mississippi; that said Henry Anderson made and executed his last will and testament, dated the 28th day of February, A. D. 1846, and afterwards on the 3d day of April of said year, died, after which his said last will and testament was duly probated in and by the Probate Court of Marshall County, Mississippi, which said court by the laws of the State of Mississippi had jurisdiction to probate said will, which afterwards was recorded in said Probate Court as the last will and testament of the said Henry Anderson, deceased, and that afterwards a duly authenticated copy of said last will and testament with the proceedings admitting it to probate and record taken from the records of said Probate Court of Marshall County, Mississippi, was filed in the Probate Court of Lucas County, Ohio, and by it was duly admitted to probate and record, as a will from another State, and then and thereby became and now is the last

will and testament of the said Henry Anderson, deceased, and is in full force and effect; a true, full and correct copy of said will is hereby attached marked Exhibit A, and hereby made a part hereof.

"5th. That the said Henry Anderson upon his death left surviving him, his two sons, his only heirs at law, to wit, William Anderson, who was born February 12, 1828, and James H. Anderson, who was born June 25th, 1831; that said William Anderson died intestate January, A. D. 1850, unmarried and without issue.

"6th. That said James H. Anderson, surviving son of Henry Anderson, died intestate at the city of Memphis in the State of Tennessee, on September 16, A. D. 1902, leaving surviving as his only child and only heir at law, the plaintiff, Peter Anderson, who was born August 27, 1859, and who is the grandson and only grandchild and only living descendent of the said Henry Anderson, deceased.

"7th. That the property described in plaintiff's petition and involved in this action is now and was at the commencement of this action worth over $100,000.00, and that the defendant Rosewell Messinger is now and ever since the 15th day of September, 1902, has been in the actual possession of said real estate, and during all of said time has received the rents, issues and profits thereof, and at all times since said date has refused and still refuses to
27 surrender said real estate to plaintiff or to account to him for said rents, issues and profits or any part thereof.

8th. That at the commencement of this action the plaintiff Peter Anderson was now is and all the time since has remained a resident and citizen of the city of Memphis of the State of Tennessee and of no other city or state, and this defendant, Rosewell Messinger at the commencement of this action was a resident and citizen of Lucas County, Ohio, and at all of said times has remained and now is a resident and citizen of said county and state, all as stated in plaintiff's petition filed herein."

To that portion of Section 3 which reads as follows: "That the foregoing stipulation in this, the third paragraph hereof, regarding the recitals in the pleadings and other proceedings is subject to verification by the production by the defendant of duly certified copies of the record of said cause unless the same is hereafter waived on the margin hereof by counsel for plaintiff," the defendant objected.

To that portion of said Section 3 of said stipulation No. 1 reading as follows: "That after said sale the said Henry Anderson and Charles Butler entered into a written contract, a copy of which is hereto attached Marked Exhibit E and made a part hereof" the defendant objected.

To further maintain the issues upon his part, the plaintiff offered and read in evidence the will of Henry Anderson, of which a copy is filed as Exhibit A to said stipulation No. 1, and which is in the words and figures following, to-wit:

"I, Henry Anderson, do make and ordain this to be my last will and testament. I declare my domicil to be the town of Holly Springs, Marshall County, State of Mississippi, I revoke the will

made by me on the 3d of March, 1837, and all other wills, if any there be.

"Item. I give, devise and bequeath to Peter Anderson, Walter Goodman and Peter W. Lucas all my property both real and personal, legal and equitable in possession reversion or remainder, and all claims and demands whatsoever, except such right, title or claim to land, money or choses in action as I may be entitled to as one of the agents of the American Land Company and as one of the stockholders of said company; this property they shall hold in trust and if one or more of them die, the survivors or survivor
28 shall hold in trust for the following purposes: they shall pay my debts, other than such as may be owing to the American Land Company, out of moneys on hand and such property as may be sold least injurious to my estate. I wish them to collect debts due to me, and apply to this purpose. They may, if they think fit, and can, obtain an extension of time on any debt, and they may pledge my property to raise money to pay debts. They may sell for cash or on credit, and if at anytime, they have funds on hand not required for debts or legacies they may invest the same. They shall have full power to make titles for property sold and to pay charges for preservation and in all respect have the power of owners but always as trustees. I have entire confidence in each of them and therefore I give each the power of all, so that each may do separately what all acting together may do, except in making investments; in that I wish all to join. The annual accounts of my said trustees signed by their respective names shall be binding on my heirs and shall be conclusively so unless error or fraud be clearly established. I have directed the payment of debts, other than what I may owe the American Land Company. I exclude the debts to the Company, because that is subject to an account with the Company and I do not wish my trustees to make payments before that account is adjusted. The adjustment of that account, and the direction and management of the affairs of the company so far as I have power, right or interest, I place in the hands of Peter Anderson and Walter Goodman and when they have finally closed it, it shall become a part of the trust created by this article of my will and subject to the control of my said trustees. By saying "it shall become a part of the trust" I mean the effects and proceeds that I may be entitled to as stockholder and agent of the company.

"Item. As agent of the American Land Company jointly with my brother I am entitled to an account with the Trustees, and it is my will that this claim for an account, and all rights, claims and powers growing out of any contract or contracts with the Trustees do vest in Peter Anderson and Walter Goodman as I have before said. They shall have power to settle with the Trustees immediately or at such time as they may think best, and they shall be entitled to receive conveyances of land, should a division of land take place, and should the notes of the company be divided, they shall be entitled to receive the same. The lands they may receive

shall be taken to them as trustees of this my will. They
29 shall have power to execute all papers necessary for a settlement of the agency and all papers executed by them shall be binding on my heirs. When this business is finally closed I direct that they make out and sign a schedule of the property received on account of said interest and an account explanatory of the settlement, and the same shall be taken as a proper inventory and the property therein contained shall thereafter become vested in my trustees created by the first clause of my will, but if there be real estate therein contained, and the same stand in their name, as trustees, that is in the name of Peter Anderson and Walter Goodman as above stated, a title from them shall be good and sufficient to a purchaser. My intention being that this interest shall only come under the administration of the Trustees first created and my executors hereinafter named from and after the time such interest is ascertained by a final close with the company. I have acted as agent for the Trustees of the American Land Company in respect to the lands of the Company in the State of Arkansas and elsewhere. What may be due me for such services is a claim that I desire to go to the said Peter & Walter and not to my trustees first named. It forms a portion of my claims against the company which I wish settled on the final settlement with them. I suppose that I have made myself fully understood, but for greater certainty I repeat that my wish is that nothing be taken from the company—interest for debts or legacies unless such debts as are connected with the company. At the same time if my other property can not pay my debts or can not pay them without injury, and it be found that it would not be unjust to withdraw funds from the company interest, then it may be done, not otherwise. When my interest in the company is finally ascertained it shall, as I have said, become a part of the trust first created, and the said Peter W. Lucas shall indorse his acceptance of the schedule of the two Trustees who have signed it. I give to each, that is to Peter Anderson and Walter Goodman severally the same powers that both are invested with. In both of the trusts created by this will my trustees shall not be required to give security, nor shall they be liable for each other and their accounts signed by them respectively shall be evidence binding on my heirs of the correctness unless error or fraud be clearly shown.

"Item. It is my will that when my son William arrives at the age of twenty-one years the trustees of the first and general
30 trust shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one-half of my property, reserving thereout two-fifth parts of said moiety, by valuation which my said trustees shall hold in trust and properly invest and pay over to him at the age of twenty-five years. If my interest in the American Land Company be not brought into the general trust at the time William becomes twenty-one, but is brought in any time before he arrives at twenty-five, so soon as brought in, two-fifths shall be deducted therefrom, and invested and paid over to

him at twenty-five the other three-fifths he shall have as soon as paid in. I find the above does not express my will in this: when I say two-fifths shall be deducted from the interest I may have in the Land Company for investment and three-fifths to be paid to him, I mean two-fifths of a moiety shall be deducted and three-fifths of a moiety paid over.

It is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective period- of twenty-one and twenty-five years of age being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the regulations laid down concerning the same.

If either of my sons die without lineal descendants the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants then one-half both of the decedent's original portion as well as one-half of the portion taken by survivorship shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother Peter, be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving then the share shall go to my other brother and sisters surviving at the time of such decease of my son. I make the following explanation. The limitations over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. Nothing in the fore-
31 going will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years respectively. The above limitations over shall give way to the provision of such wills.

"Item. I entered into a contract with the American Land Company to warrantee title to such lands of the company as might be sold, and it so is that many title bonds are not out binding me to such warrantees. I give to Peter Anderson and Walter Goodman or either of them the power to execute deeds to carry out such warrantees, and I declare that the name of either with the seal of either to such deeds shall bind my heirs, executors and administrators. It is also the case that I hold lands in common with Daniel Saffarrans. It is important that these lands be sold as purchasers may offer. My undivided half interest has already by this my will been devised to my general trustees. I declare that they or either of them shall have the power to convey with warrantee. This power I presume they have by the first clause of my will, which vests the title in them. I only mention it here for greater certainty.

"Item. If my brother Peter desires to keep up a household in this place, I bequeath to him the use of my house, outhouses, stables lots, household furniture, books, horses, carriages and whatever belongs to the household establishment and also all my slaves or

such of them as he may desire to have. I do not require that any inventory or appraisement of them be made, but on the breaking up of such household, he shall make out an inventory of such as remain unconsumed by use, and my other two trustees shall indorse an acceptance thereof after which time the property in such inventory shall go into the general trust and be subject to all the regulations therein laid down.

"Item. I give to my niece Caroline, daughter of my brother William, one thousand dollars, payable after my debts are satisfied, I direct my executors to pay her sixty dollars per an. as interest thereon from the time of my death until paid.

"Item. I give to my niece Rucellea, daughter of my brother Robert, two thousand dollars payable after my debts are satisfied and I direct my executors to pay her one hundred dollars as interest thereon from my death until paid.

"I have directed that a portion of my property shall be placed in the hands of my sons on their arriving at twenty-one, and I have — that my trustees shall have the power to procure extension of my debts, and I have made the payment to my sons dependent on the payment of my debts. Now on reconsideration it occurs
32 to me that it may so happen that there will be outstanding and unadjusted accounts at the time my sons arrive at twenty-one and yet it might be in no wise injurious or improper to place my sons in possession of a part of what may be coming to them. My trustees are therefore authorized, if they think fit, to let them have a portion of what is coming to them at twenty-one, even though some debts may remain unpaid. The amount of such portion shall be according to the discretion of my trustees. It shall not exceed the amount that is limited to them on the payment of debts, nor ought it to be an amount that would jeopardize their payment.

"Remark. If the payment of the interest on the legacies jeopardize the payment of debts, the payment of such interest must cease without prejudice however to the right of the legatee to have the interest at the time they may be entitled to the principal. I further say that if the bequests to my brother Peter of the use of my household and slaves be found inconveniently to impair the capacity of the executors or trustees to pay debts, the use shall cease and no rights shall arise to him by such lapse or ceasing of the bequest.

"I give to my son William my diamond ring. I give to my son James the watch which my son William wears, which belonged to his mother.

"I appoint my brother Peter to be guardian of my sons and I direct that no security be required of him.

"I appoint my brother Peter and Walter Goodman & Peter W. Lucas to be the executors of this my will and direct that no security be required of either of them.

"In testimony that this is my will I have hereto affixed my seal and have subscribed my name and written my name in the margin this 28th of February, 1846.

[SEAL.] HENRY ANDERSON.

"We the undersigned attest that Henry Anderson signed and sealed this instrument in our presence and declared it to be his last will and we have subscribed the same in his presence and in the presence of each other.

"Z. M. PHELPS.
H. M. LUSHER.
ISAAC SAFFARRANS."

To further maintain the issues upon his part, the plaintiff offered in evidence the contract of October 4th, 1844, a copy of which is attached as Exhibit E to said stipulation No. 1 and which is in the words and figures following to-wit:

"Whereas Charles Butler of the City of New York, as collateral security for the payment of his note in favor of Henry
33 Anderson of Holly Springs, in the State of Mississippi, for twenty thousand dollars, heretofore duly assigned to the said Henry Anderson, a certain bond executed by Edward Bissell of Toledo, in the county of Lucas and State of Ohio, bearing date the 19th day of May, 1838, and conditioned for the payment of twenty-one thousand five hundred dollars, in one year from the date thereof with interest, together with a certain mortgage collateral to said bond executed by the said Edward Bissell and Jane A. M. his wife, on certain lots of land lying in the Port Lawrence Division of Toledo aforesaid, in said mortgage particularly specified, and whereas default having been made in the payment of the moneys intended to be secured by said bond and mortgage, such proceedings in relation thereto have been taken in the name and behalf of the said Henry Anderson the assignee of said bond and mortgage, that an order for the sale of the premises embraced in said mortgage has been duly made and confirmed; and whereas also a decree or judgment has been or may be obtained in favor of the said Henry Anderson against the said Edward Bissell personally, for the amount of such deficiency as may be due on said bond and mortgage after the sale of the mortgaged premises.

"And whereas the said Charles Butler as a farther collateral security for the payment of his said note, in favor of the said Henry Anderson, has heretofore duly assigned to the said Henry Anderson, five hundred and forty-six shares of the capital stock of the Erie and Kalamazoo Railroad Company, of the par value of fifty dollars per share.

"And whereas the said Henry Anderson at the instance and request of the said Charles Butler and in consideration of the covenant of the said Charles Butler hereinafter contained is willing to relinquish and surrender to the said Charles Butler, the collateral securities, so assigned as aforesaid, for the payment of said note of twenty thousand dollars, so far as the same may be done without preiudice or injury, to the order obtained for the sale of the said mortgaged premises, and the rights of the said Henry Anderson under the same, and without preiudice to the personal liability of the said Charles Butler, to the said Henry Anderson on the principal debt.

"Now, therefore these presents witness, that in consideration of the premises and for the purpose of giving effect to the same, the said Henry Anderson has on the day of the date hereof executed and delivered a power of attorney to the said Charles Butler, empowering and authorizing him fully and effectually, if he shall see fit to do so to release and discharge the said Edward Bissell of and from
34 all personal claim, demand or liability whatsoever for or on account of the said bond and mortgage but without prejudice to the proceedings, which have been or may be adopted, to offset the sale of said mortgaged premises and that the said Henry Anderson has also by instrument in writing released and transferred to the said Charles Butler the said five hundred and forty-six shares of Erie and Kalamazoo Railroad Company stock.

"And the said Charles Butler, in consideration of the surrender and relinquishment of the said securities hereby covenants and agrees to and with the said Henry Anderson, that the same shall not be held or construed in any way to effect or impair the liability of him the said Butler on the said note for twenty thousand dollars, and the said Charles Butler also covenants and agrees to and with said Henry Anderson that he the said Butler will well and faithfully apply and pay over to the said Henry Anderson, on account of the said note, all sums of money or other valuable consideration, which he the said Butler may receive or derive, by reason of the surrender and relinquishment of the securities aforesaid, by him the said Henry Anderson.

"In testimony whereof the said Henry Anderson and Charles Butler have hereunto respectively set their hands and seals, in duplicate this fourth day of October in the year one thousand eight hundred and forty-four.

[SEAL.] (Signed) HENRY ANDERSON.
[SEAL.] CHARLES BUTLER.

"In presence of

(Signed) S. H. FLEETWOOD."

To said last named document the defendant objected upon the grounds of irrelevancy and incompetency and upon the further ground that said contract would not be binding upon the defendant in the absence of notice which brought it clearly home to him.

This objection was by the Court sustained, to which plaintiff then and there excepted.

The defendant also objected to the introduction of the will of Henry Anderson on the ground and for the reason that it shows that the plaintiff has no title and is therefore immaterial, incompetent and irrelevant. The objection was overruled by the Court and the defendant then and there excepted.

To further maintain the issues upon his part the plaintiff offered and read is evidence stipulation No. 5, which is in the words and figures following, to-wit:

In the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

35 No. 1897.

PETER ANDERSON, Plaintiff.
vs.
ROSEWELL E. MESSINGER, Defendant.

Stipulation No. 5.

It is hereby stipulated and agreed by and between the parties in the above entitled case by their respective attorneys as follows:

First. That the gross income to defendant from the property in controversy, from September 16th, 1902, the date of the death of James H. Anderson to and until December 27th, 1904, the date of the filing of the petition herein, a total period of two years three and one-half months, was thirty thousand ($30,000.00) dollars.

Second. That during said period of two years three and one-half months, defendant paid for and on account of said property the following sums:

Taxes and assessments	$8,250.00
Insurance and repairs	3,500.00
For water rent, electric light, coal for heating said building and janitor service	5,250.00
Total	$17,000.00

Third. That the gross income to defendant from the property in controversy from December 27th, 1904, at which date the petition was filed herein, to June 20th, 1905, was six thousand five hundred ($6,500.00) dollars.

Fourth. That during said period of about six months, defendant paid for and on account of said property the following sums:

Taxes and assessments	$1,650.00
Insurance and repairs	750.00
For water rent, electric light, coal for heating said building and janitor services	1,100.00
Total	$3,500.00

The statements contained in the foregoing stipulation or any of them, may be offered and read in evidence by either of the parties to this cause, upon the trial thereof, with the same force and effect that the proof of said facts in the usual way would have, subject however to such objection as said parties respectively may see fit to interpose thereto for want of competency, relevancy or materiality.

In witness whereof the parties hereto have executed this stipulation this 20th day of June, A. D. 1905.

PETER ANDERSON,
By C. A. THATCHER AND
R. P. CARY,
Attorneys for Plaintiff.

36 ROSEWELL E. MESSINGER,
By C. W. EVERETT,
O. B. SNIDER, AND
KING & TRACY,
Attorneys for Defendant.

To the introduction of each and every part of said stipulation the defendant objected upon the ground of incompetency, irrelevancy and immateriality and the objection being overruled by the Court the defendant excepted.

To further maintain the issues upon his part the plaintiff called for cross-examination *of* the defendant ROSEWELL E. MESSINGER, who testified in substance that the gross income from the property involved in this litigation from December 27th, 1904, to December 5th, 1905, amounted to $26,379 37-100.

Thereupon said Messinger further testified that the amount paid by him for taxes, assessments, insurance premiums, repairs, and other charges, against said premises, from December 27, 1904, to December 5, 1906, was $13,801.96. Plaintiff objected to said testimony for want of relevancy, competency and materiality, which was overruled and exception taken and moved to strike it out for the same reasons, overruled and exceptions taken.

To this evidence the defendant objected upon the ground of incompetency, irrelevancy and immateriality; for the reason that it was since the commencement of the action; and for the reason that it was not in the pleadings. Said objection was by the Court overruled, and the defendant excepted.

To further maintain the issues upon his part the plaintiff offered and read in evidence Section 8 of Stipulation No. 3, which is in the words and figures following, to-wit:

"That the parents of Henry Anderson died some years prior to the date of his death."

This evidence was objected to by the defendant on the ground of incompetency, irrelevancy and immateriality and the objection being overruled by the Court the defendant excepted.

Thereupon the plaintiff rested.

At this juncture the defendant moved the Court to arrest the cause from the jury and to direct a verdict in favor of the defendant upon the ground that the plaintiff had offered no proof to show title in himself. This motion was denied by the Court and the defendant excepted.

37 To maintain the issues upon his part the defendant then offered and read in evidence a duly certified copy of the deed from Peter Anderson and Walter Goodman as trustees

and executors of Henry Anderson, deceased, to Charles Butler, dated October 1st, 1855, and which is in the words and figures following, to-wit:

"This indenture, made the first day of October, in the year of our Lord one thousand eight hundred and fifty-five, between Peter Anderson and Walter Goodman, both of Holly Springs in the State of Mississippi, Trustees and Executors under the last will and testament of Henry Anderson late of Holly Springs in said State, deceased, of the first part, and Charles Butler, of the City of New York in the State of New York of the second part, Witnesseth, that the said parties of the first part by virtue of the power and authority to them given in and by the said last will and testament, and for and in consideration of the sum of one dollar (and other considerations) lawful money of the United States of America, to them in hand, paid, at or before the ensealing and delivery of these presents, by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs and assigns forever released and discharged from the same by these presents, have granted, bargained, sold, aliened, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, his assigns forever. All those certain lots or parcels of land, situate lying and being in the Vistula Division of the City of Toledo, County of Lucas, State of Ohio, known "as" designated as lots numbers eighteen (18) nineteen (19) twenty (20) twenty-one (21) one thousand and eight (1008) one thousand and nine (1009) thirty (30) thirty-one (31) thirty-two (32) thirty-three (33) thirty-four (34) one thousand (1000) one thousand and one (1001) said lots being in one block bounded northerly by Summit Street, southerly by Water Street, easterly by Cherry Street and westerly by Lynn Street, also Water lot number nine hundred and ninety-two (992) extending from Water Street to the line of wharfing and fronting on the Miami River one hundred and seventy-six feet and sixty-five hundredths of a foot also town lots in the Port Lawrence division of said City of Toledo numbered one hundred and eighty-five (185) one hundred and seventy-six (176) one hundred and eighty-eight (188) two hundred ninety-eight (298) one hundred and fifty-seven (157) forty-eight (48) two hundred
38 and forty-six (246) two hundred and sixty-two (262) two hundred and eighty-six (286) three hundred and four (304) three hundred and thirty-two (332) three hundred and thirty-three (333) three hundred and thirty-six (336) three hundred and thirty-seven (337) and three hundred and thirty-eight (338) as the same were laid out and numbered on the recorded map of said city, being the same premises conveyed by Edson Allen, Master Commissioner in Chancery to Henry Anderson by deed dated the eighteenth November one thousand eight hundred and forty-four.

Together with all and singular the edifices, buildings, rights, members, privileges, advantages, hereditaments and appurtenances to the same belonging or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and

profits thereof. And also all the estate, right, title, interest, claim and demand whatsoever, both in law and equity, which the said testator had in his lifetime, and at the ime of his decease and which the said parties of the first part, or either of them have or hath, by virtue of the said last will and testament, or otherwise, of, in and to the same, and every part and parcel thereof, with the appurtenances; to have and to hold the said premises above mentioned and described, and hereby granted and conveyed, or intended so to be, with the appurtenances, *"under"* the said party of the second part, his heirs and assigns, to his and their proper use, benefit and behoof forever. It being understood that the above described premises were conveyed to Henry Anderson in fee, but held by him in his lifetime as a mortgage to secure the payment of a certain sum of money due from Charles Butler to Henry Anderson which fact, after his death was duly acknowledged under seal of William Anderson and James H. Anderson his only heirs at law; said parties of the first part covenant, grant, promise and agree to and with the said party of the second part, his heirs and assigns, that the said party of the second part, his heirs and assigns shall and lawfully may from time to time, and at all times forever hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy all and singular the said hereditaments and premises hereby granted and conveyed or intended so to be, with their and every of their appurtenances and receive, and take the rents, issues and profits thereof, to and for his and their own use and benefit, without any lawful let, suit,
39 hindrance, molestation, interruption or denial whatsoever, of, from or by them the said parties of the first part, or their assigns; or of, from or by any other person or persons whomsoever lawfully claiming or who shall or may lawfully claim hereafter, by, from or under them or either of them, or by, from or under their heirs or assigns any right, title, interest or estate; and that free and clear and freely and clearly discharged, acquitted and exonerated, or otherwise well and sufficiently saved defendant, keep harmless and indemnified by them the said parties of the first part, their heirs and assigns, of, from and against all and all manner of former and other gifts, grants, bargains, sales, mortgages, judgment and all other charges and incumbrances whatsoever, had, made, committed, executed or done by them the said parties of the first part, or by, through, or with their acts, deeds, means, consent, procurement or privity.

In witness whereof, the said parties to *their* presents have hereunto interchangeably set their hands and seals the day and year first above written.

[SEAL.] P. ANDERSON,
Ex. & Trus. &c.

[SEAL.] W. GOODMAN,
Ex'r & Trustee under the Will of H. Anderson, Dec'd.

Sealed and delivered in the presence of,

FINLEY I. WRIGHT.
S. H. FLEETWOOD.

STATE OF NEW YORK,
City and County of New York, ss:

On this ninth day of October, eighteen hundred and fifty-five, before me a commissioner for said state appointed by the Governor of the State of Ohio, to take acknowledgments of deeds to be recorded in said State of Ohio, personally came Peter Anderson and Walter Goodman to me known to be the grantors described in and who executed the within deed and severally acknowledged the signing and sealing of said deed as their voluntary act.

In witness whereof I have hereunto subscribed my name and affixed my official seal.

[SEAL.] STANLEY H. FLEETWOOD,
Commissioner.

(Endorsed:) Peter Anderson & Walter Goodman, trustees & executors of Henry Anderson, dec'd, to Charles Butler, dated 1st October, 1855. Deed lots in Toledo. Recorder's Office Lucas Co. Rec'd for record May 2nd, 1860, & recorded May 2nd, 1860, in Vol. 34 of deeds, pages 110, 111 and 112. Jonathan Wynn, Recorder. Fees $1.35.

40 To the introduction of this document the plaintiff objected upon the ground that it was immaterial, incompetent and irrelevant and upon the further ground that it was delivered by the executors after the termination of their power as executors or trustees.

The objection was by the Court overruled and the plaintiff excepted.

Plaintiff further objected to the introduction of said document upon the ground that under its terms the trustees and executors were not authorized to make a deed of that character, which objection was by the Court overruled and plaintiff excepted.

To further maintain the issues upon his part the defendant offered and read in evidence a certified copy of the deed from Peter Lucas, Executor of Henry Anderson, deceased, to Charles Butler, dated April 16th, 1860, and which is in the words and figures following, to-wit:

"EXHIBIT C."

"This indenture, made the sixteenth day of April, in the year of our Lord one thousand eight hundred and sixty, between Peter W. Lucas of Holly Springs, in the State of Mississippi, one of the trustees and executors under the last will and testament of Henry Anderson late of Holly Springs deceased of the first part and Charles Butler of the City of New York of the second part, witnesseth, that the said party of the first part by virtue of the power and authority to him given in and by the said last will and testament, and for and in consideration of the sum of one dollar (and other considerations) lawful money of the United States of America, to him in hand paid, at or before the ensealing and delivery of these presents, by the said

party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs and assigns forever released and discharged from the same by these presents, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, his heirs and assigns forever, all those certain lots or parcels of land situate lying and being in the Vistula Division of the City of Toledo, County of Lucas, State of Ohio, known and designated as lots numbers eighteen (18) nineteen (19) twenty (20) twenty-one (21) one thousand and eight (1008) one thousand nine (1009) thirty (30) thirty-one (31) thirty-two (32) thirty-three (33) thirty-four (34)
one thousand (1000) one thousand and one (1001) said lots
41 being in one block bounded northerly by Summit Street, southerly by Water Street easterly by Cherry Street and westerly by Lynn Street, also Water lot number nine hundred and ninety-two (992) extending from Water Street to the line of Wharfing and fronting on the Miami River one hundred and seventy-six feet and sixty-five hundredths of a foot. Also town lots in the Port Lawrence Division of the said City of Toledo, numbered one hundred and eighty-five (185) one hundred and seventy-six (176) one hundred and eighty-eight (188) two hundred and ninety-eight (298) one hundred and fifty-seven (157) forty-eight (48) two hundred and forty-six (246) two hundred and sixty-two (262) two hundred and eighty-six (286) three hundred and four (304) three hundred and thirty-two (332) three hundred and thirty-three (333) three hundred and thirty-six (336) three hundred and thirty-seven (337) three hundred and thirty-eight (338) as the same were laid out and numbered on the recorded map of said City being the same premises conveyed by Edson Allen, Master Commissioner in Chancery to Henry Anderson by deed dated the eighteenth of November, one thousand eight hundred and forty-four.

Together with all and singular the edifices, buildings, rights, members, privileges, advantages, hereditaments, and appurtenances to the same belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, claim and demand whatsoever, both in law and equity, which the said testator had in his lifetime, and at the time of his decease, and which the said party of the first part has or hath, by virtue of the said last Will and Testament, or otherwise, of, in and to the same, and every part and parcel thereof, with the appurtenances; to have and to hold the said premise- above mentioned and described, and hereby granted and conveyed, or intended so to be, with the appurtenances, *unto* the said party of the second part, his heirs and assigns, to his and their only proper use, benefit and behoof forever. It being understood that the above described premises were conveyed to Henry Anderson in fee but held by him in his lifetime as a mortgage to secure the payment of a certain sum of money due from Charles Butler to Henry Anderson, which fact, after his death was duly acknowl-

edged under seal by William Anderson and James H. An-
42 derson, his only heirs at law; said party of the first part covenants, grants, promises and agrees to and with the said party of the second part and his heirs and assigns, that the said party of the second part, his heirs and assigns, shall and lawfully may from time to time, and at all times forever hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy all and singular the said hereditaments and premises hereby granted and conveyed, or intended so to be, with their and every of their appurtenances, and receive and take the rents, issues and profits thereof, to and for his and their own use, and benefit, without any lawful let, suit, hindrance, molestation, interruption or denial whatsoever, of, from or by him the said party of the first part, or his assigns; or, of, from or by any other person or persons, whomsoever lawfully claiming or who shall or may lawfully claim hereafter by, from or under him, or by, from or under right, title, interest or estate; and that free and clear and freely and clearly discharged, acquitted and exonerated, or otherwise well and sufficiently saved, defended, kept harmless and indemnified by him the said party of the first part, his heirs and assigns, of, from and against all and all manner of former, and other gifts, grants, bargains, sales, mortgages, judgments, and all other charges and incumbrances whatsoever, had, made, committed, executed or done by him the said party of the first part, or by, through, or with his acts, deeds, means, consent, procurement or privity. The premises herein conveyed being the same also described and conveyed in a deed executed by Walter Goodman and Peter Anderson, two of the Executors and Trustees under the Will of Henry Anderson deceased, dated first of October, 1855, to Charles Butler, party of the second part and this deed being executed by said Lucas to remove doubts in respect to the title to the premises described and conveyed as aforesaid.

In witness whereof, the said party to these presents has hereunto interchangeably set his hand and seal the day and year first above written.

Sealed and delivered in the presence of Wm. M. Sinckland, J. D. M. Litchfield.

[SEAL.] P. W. LUCAS,
Executor of H. Anderson, Deceased.

THE STATE OF MISSISSIPPI.
Marshall County:

Personally appeared before me, A. W. Goodrich, an acting Jus-
43 tice of the Peace, in and for said county the within named P. W. Lucas, who acknowledged that he signed, sealed and delivered the within deed on the day and year therein mentioned as his act and deed. In testimony whereof, I have hereunto set my hand and affixed the notarial seal of said county this 17th day of April, 1860.

[SEAL.] A. W. GOODRICH,
J. P. & ex-Officio Notary Public.

(Endorsed.)

Peter W. Lucas, Trustee, etc., to Charles Butler.
Dated —— 185–.
Deed.
Recorder's Office Lucas County, Ohio, received for record May 2nd, 1860, and recorded May 3rd, 1860, in Vol. 34 of Deeds pages 112, 113 and 114.
Fees $1.40.

JONATHAN WYNN,
Recorder.

To the introduction of this document plaintiff objected upon the ground of incompetency, irrelevancy and immateriality; upon the further ground that the will of Henry Anderson shows upon its face that the power of the executors and trustees had expired by limitation in the will prior to the date of the deed as well as prior to its delivery; and upon the further ground that the grantor therein had no right to make the deed as executor solely, and if any right to so make such deed under the will existed it was as trustee or as executor and trustee. This objection was by the Court overruled and the plaintiff excepted.

To further maintain the issues upon his part, the defendant offered in evidence a certified copy of a deed from James H. Anderson to Charles Butler, dated April 7th, 1860, which is in the words and figures following, to-wit:

"Exhibit D 3."

"This indenture, made the seventh day of April in the year one thousand eight hundred and sixty, between James H. Anderson of Austin, Tunica County, in the State of Mississippi (late of Holly Springs in said State), and Lida G. his wife of the first part and Charles Butler of the City of New York of the second part, witnesseth that the said party of the first part, for and in consideration of the sum of one dollar (and other considerations) lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released and quit claimed and by these presents do remise, release and quit claim, unto the said party of the second part, and to his heirs and assigns forever, all those certain lots or parcels
44 of land situate, lying and being in the Vistula Division of the City of Toledo, County of Lucas, State of Ohio, known and designated as lots numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21) one thousand and eight (1008), one thousand and nine (1009) thirty (30), thirty-one (31), thirty-three (33), thirty-four (34), one thousand (1000) one thousand and one (1001), said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street, also Water lot number nine hundred and

ninety-two (992) extending from Water street to the line of wharfing and fronting on the Miami River one hundred and seventy-six feet and sixty-five hundredths of a foot. Also town lots in the Port Lawrence Division of said city of Toledo numbered one hundred and eighty-five (185) one hundred and seventy-six (176) one hundred and eighty-eight (188) two hundred and ninety-eight (298), one hundred and fifty-seven (157) forty-eight (48) two hundred and forty-six (246) two hundred and sixty-two (262) two hundred and eighty-six (286) three hundred and four (304) three hundred and thirty-two (332) three hundred and thirty-three (333) three hundred and thirty-six (336) three hundred and thirty-seven (337) and three hundred and thirty-eight as the same were laid out and numbered on the recorded map of said city; being the same premises conveyed by Edson Allen, Master Commissioner in Chancery to Henry Anderson by deed dated the eighteenth of November, one thousand eight hundred and forty-four. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also, all the estate, right, title, interest, dower, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances to have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JAMES H. ANDERSON. [L. S.]
LIDA G. ANDERSON. [L. S.]

Sealed and delivered in the presence of

Q. GOODMAN,
B. W. WATTHALL.

45 Printed word "fifty" erased word "sixty" inserted.

THE STATE OF MISSISSIPPI,
Marshall County:

Personally appeared before me, A. W. Goodrich, an acting Justice of the peace and ex-officio notary public in and for said county, the within named James H. Anderson and Lida G. Anderson, his wife, who severally acknowledged that they signed, sealed and delivered the within deed on the day and year therein mentioned as their act and deed—the said Lida G. Anderson on a private examination, separate and apart from her said husband acknowledged that she signed and sealed and delivered said deed as her voluntary act and deed freely without any fear, threats or compulsion of her said husband.

In testimony whereof I have hereunto set my hand and affixed the notarial seal this the 16th day of April, A. D. 1860.

[SEAL.] A. W. GOODRICH,
J. P. & ex-Officio Notary Public.

Endorsed: James H. Anderson and wife to Charles Butler, dated 7th April, 1860. Quit Claim Deed. Recorded office Lucas Co. Received for Record May 2nd-60 and recorded May 3rd, 1860, in Vol. 34 of Deeds, pages 114 and 115. Jonathan Wynn, Recorder, fees 90 cents.

To the introduction of this document the plaintiff objected on the grounds of incompetency, irrelevancy and immateriality and upon the further ground that being the deed of a life tenant it could not convey away the estate of the remainderman, and was incompetent as evidence against the latter in an action by him to recover his title. This objection was by the Court sustained and the defendant excepted.

To further maintain the issues upon his part the defendant offered and read in evidence a certified copy of a deed from Charles Butler and wife to Calvin Bronson dated April 23rd, 1860, which is in the words and figures following, to-wit:

1

Charles Butler and wife
to
Calvin Bronson.

Deed.

Know all men by these presents, that I, Charles Butler of the city, county and state of New York in consideration of the sum of seventeen thousand and five hundred dollars to me paid by Calvin Bronson of the city of Toledo, in the county of Lucas and state of Ohio, the receipt whereof is hereby acknowledged do hereby bargain, sell and convey unto the said Calvin Bronson and his heirs and assigns forever the following described real estate situate in county of Lucas and state of Ohio, to-wit: Lots Nos. one thousand and eight (1008) one thousand and nine (1009) thirty (30)
46 thirty-one (31) thirty-three (33) thirty-four (34) one thousand (1000) one thousand and one (1001) eighteen (18) nineteen (19) twenty (20) and twenty-one (21) in the Vistula Division of the city of Toledo as numbered and designated on the Gower Map (socalled) of said city on file in the Recorder's office of Lucas county, Ohio, being the entire block of land lying within the boundary of Summit, Cherry, Water and Lynn streets, in said Vistula Division of Toledo, saving however and excepting and reserving from the above described premises, all rights which the Western Seamans Friend Society have in and to sixty (60) feet front on Lynn street being thirty feet each side of the center of the

Bethel Church as said church now stands and extending back the same width to a point eighty feet from the northwesterly line of said Lynn street; the said Western Seamans Friend Society now being in the occupation of said premises by virtue of an agreement on the part of me the said Charles Butler to donate the same to said society as a building site for a Bethel Church to be used and occupied by said society for Bethel Church purposes and no other, together with all the privileges and appurtenances to the same belonging.

To have and to hold the same unto the said Calvin Bronson and his heirs and assigns forever, hereby covenanting that the title so conveyed is clear free and unincumbered except by the claim of the Western Seaman's Friend Society as aforesaid and *with* I will warrant and defend the same against all claims whatsoever, except said claim of the Western Seaman's Friend Society, and all claims for taxes and assessments levied or assessed on said premises since the twenty-sixth day of December, A. D., 1859, and I, Eliza A. Butler wife of the said Charles Butler in consideration of one dollar to me in hand paid do remise, release and forever quit claim unto the said grantee all my right by way of dower or otherwise in and to the above granted tenements.

In witness whereof we the said Charles Butler and Eliza A. Butler hereunto set our hands and seals this twenty-third day of April in the year eighteen hundred and sixty.

[SEAL.] CHARLES BUTLER.
[SEAL.] ELIZA A. BUTLER.

Signed, sealed and delivered in presence of

E. ANNIE BUTLER.
SAM. T. BULL.

THE STATE OF NEW YORK,
New York City and County, ss:

On this twenty-third day of April, A. D. 1860, before me the subscriber a commissioner for the state of Ohio duly commissioned and sworn dwelling in the city of New York personally appeared Charles Butler and Eliza A. Butler the grantors in the above conveyance and acknowledged the same to be their voluntary act and deed for the uses and purposes therein mentioned. And the said Eliza A. Butler wife of the said Charles Butler being examined by me separate and apart from her said husband and the contents of said Deed made known and explained to her did declare that she did voluntarily sign, seal and acknowledge the same and that she was still satisfied therewith as her act and deed for the uses and purposes therein mentioned.

47

In witness whereof I have hereunto set my hand and affixed my official seal on the day and year last aforesaid.

[SEAL.]

SAM T. BULL.
Commissioner for the State of Ohio.
ALEX. READ,
County Auditor.

Transferred May 2, 1860.

Received for Record May 2, 1860 and recorded May 3, 1860. Vol. 34 of Deeds, pages 116 and 117.

JOHNATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, County Recorder, of Lucas County, in the state aforesaid, do hereby certify the above and foregoing to be a true perfect and complete copy of the record of a certain Deed, recorded in Volume 34, of the Record of Deeds of said Lucas County, at page 116, which said Record of Deeds is in the office of County Recorder of said Lucas County, and is in my custody and control as such County Recorder.

In testimony whereof, I have hereunto set my name and affixed my official seal at Toledo, in said county, this 29th day of April, A. D., 1905.

(Signed) THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

To the introduction of this document the plaintiff objected upon the ground of incompetency, irrelevancy and immateriality and upon the further ground that no title in Charles Butler had been shown in this proceeding. This objection was by the court overruled and the plaintiff excepted.

To further maintain the issues upon his part the defendant offered and read in evidence the original deed of which a certified copy had just been offered, namely, the deed from Charles Butler and wife to Calvin Bronson, which was in words and figures identical with said copy.

To the introduction of this document the plaintiff objected upon the grounds heretofore stated with respect to the copy of the same, and for the further reason that if said copy was com-
48 petent the introduction of the original in addition thereto was merely a useless uncumbering of the record.

This objection was by the Court overruled and the plaintiff excepted.

To further maintain the issues upon his part the defendant read in evidence a certified copy of a deed from Sidney Bissell and others to Charles Butler dated February 22, 1843, which is in the words and figures following, to-wit:

"EXHIBIT F."

"This indenture, made the twenty-second day of February, in the year one thousand eight hundred and forty-three, between Sidney Bissell, Edward Bissell and Jane A. M. his wife, of the city of Toledo, Lucas County, Ohio, of the first part, and Charles Butler, of the city of New York, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar to them in hand paid by the said party of the second part,

the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold remised, released and by these presents do grant, bargain, sell, remise, release and forever quit claim, unto the said party of the second part and to his heirs and assigns forever, all those certain pieces, parcels, or lots of land situate, lying and being in the city of Toledo, in the county of Lucas and state of Ohio, and described as follows, to-wit: Town lots numbered eighteen (18) nineteen (19) twenty (20) twenty-one (21), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1000) one thousand and one (1001), one thousand and eight (1008) one thousand and nine (1009), nine hundred and ninety-two (992) in the Vistula Division of the city of Toledo as the same are laid out and numbered on the map or plat of said city made by Robert Gower, surveyor, and now recorded or on file in the office of the Recorder of Deeds for said county; also town lot numbers forty-eight (48) one hundred and fifty-seven (157) one hundred and eighty-five (185) two hundred and forty-six (246) one hundred and eighty-eight (188), two hundred and sixty-two (262), two hundred and eighty-six (286), two hundred and ninety-eight (298), three hundred and four (304), three hundred and thirty-two (332), three hundred and thirty-three (333) three hundred and thirty-two (332), three hundred and thirty-six (336) three hundred and thirty-seven (337) three hundred and thirty-eight (338) and ninety-seven (97), and ninety-eight (98) the two
19 last named lots running from Summit street to the front line of wharfing as established by the proprietors of the Port Lawrence Division of Toledo. The said last mentioned lots from and including lot number forty-eight to and including lot number ninety-eight as the same are contained in the above description are all situate in said Port Lawrence Division of said city and laid out numbered and designated on the said day before named.

"Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all the estate, right, title, interest or demand whatsoever, of the said parties of the first part, either in law or equity, of, in and to the above bargained premises, with the said hereditaments and appurtenances. To have and to hold the said lots and premises to the said party of the second part and to his heirs and assigns, to the sole and proper use, benefit and behoof of the said party of the second part his heirs and assigns forever.

In witness whereof, the said parties of the first part, have hereunto set their hands and seals the day and year first above written.

SIDNEY BISSELL. [L. S.]
EDWARD BISSELL. [L. S.]
JANE A. M. BISSELL. [L. S.]

Signed, sealed and delivered in the presence of

FREDERICK BISSELL.
JUNIUS FLAGG.

In the fifteenth line the words and figures following were interlined before signing, to-wit: "Two hundred and ninety-eight (398)."

THE STATE OF OHIO,
Lucas County, ss:

On this 13th day of March, A. D. 1843, personally came before me the subscriber the within named Sidney Bissell, Edward Bissell, and Jane A. M. Bissell, the wife of the said Edward Bissell, and acknowledged the execution of the within deed to be their free act and deed for the uses and purposes therein mentioned. And the said Jane A. M. being by me examined separate and apart from her said husband and the contents of said deed made known and explained to her, acknowledged that she executed the same without any fear or coercion of her said husband and that she is still satisfied therewith.

Witness my hand and notarial seal the day and year last above written.

JUNIUS FLAGG,
[SEAL.] *Notary Public, Lucas County, Ohio.*

50 (Endorsed:) Edward Bissell, Jane A. M., his wife and Sidney Bissell to Charles Butler, Deed 992. Transferred Oct. 13, 1849. W. F. Dewey, Auditor, recorder's office, Lucas County, Ohio. Received for Record Oct. 11, 1849. Recorded October 13, 1849. Vol. 16, Deeds, pages 146 and 7. Henry Thacher, recorder."

To the introduction of this document the plaintiff objected on the ground of incompetency, immateriality and irrelevancy; on the further ground that the same was not shown to have been recorded until 1849, five years or thereabouts after the acquisition of title by Henry Anderson; and in view of the foregoing facts that the grantee therein could not be permitted to acquire an outstanding title and thereby place in jeopardy the title of Henry Anderson. This objection was by the court overruled and the plaintiff excepted.

To further maintain the issues upon his part the defendant offered and read in evidence Section 13 of Stipulation No. 1, which is in words and figures following to-wit:

"13th. That on the 23rd day of April, A. D., 1860, said Charles Butler of the city and state of New York, in consideration of seventeen thousand five hundred dollars ($17,500.00) paid by Calvin Bronson, of Toledo, Ohio, to said Butler, signed, sealed acknowledged and delivered a warranty deed to said Bronson and by it did duly grant, bargain, sell and convey, so far as he was able to said Calvin Bronson, his heirs and assigns forever, all of the real estate involved in this action, and that there is a regularly executed chain of conveyances and transfers from the said Calvin Bronson down to the defendant Rosewell Messinger, and that all the right, title and interest of the said Calvin Bronson in his lifetime in any way acquired in or to the real estate involved in this action was at the commencement of this action held and is now held and owned by the defendant, the said Rosewell Messinger, the grandson of said Bronson."

To the introduction of said evidence the plaintiff objected upon the ground of immateriality, irrelevancy and incompetency, and for

the further reason that the evidence of a deed of Charles Butler to Calvin Bronson is inadmissible against the plaintiff for want of title in Charles Butler to convey. This objection was by the court overruled and the plaintiff excepted.

To further maintain the issues upon his part, the defendant offered and read in evidence Section 14 of Stipulation No. 1, which is in the words an figures following, to-wit:

"14th. That after the said Calvin Bronson received his said
51 deed from said Charles Butler, and in the month of June, A. D. 1860, he entered upon the real estate involved in this action claiming under his said deed, and in the month of June, 1860, commenced the erection of a tobacco factory on said premises and erected thereon large and valuable buildings, which are now on said premises, and that the defendant, Rosewell Messinger, the grandson of said Calvin Bronson, after the death of his grandfather erected other large and expensive buildings, all of which are now on said premises."

To the introduction of this evidence the plaintiff objected upon the ground of irrelevancy, incompetency and immateriality; upon the further ground that the date upon which Calvin Bronson entered upon the real estate involved herein, the fact of his erecting and beginning the erection of improvements thereon, and that the defendant after his grandfather's death erected other improvements, thereon, throws no light upon the issues involved in this case. This objection was by the Court overruled and the plaintiff excepted.

To further maintain the issues upon his part the defendant offered and read in evidence Section 16 of Stipulation No. 1, which is in the words and figures following, to-wit:

"16th. That the said defendant Rosewell Messinger, and his grandfather Calvin Bronson, under whom he claims, have been in the open, notorious and continued possession of all of said premises since the first day of June, A. D. 1860, claiming said premises under said deed to the said Calvin Bronson from the said Charles Butler, and that said Calvin Bronson and defendant, Messinger have paid the taxes and assessments levied on said premises ever since and including the year A. D. 1860."

To the introduction of such evidence plaintiff objected upon the ground of immateriality, irrelevancy and incompetency, and upon the further ground that possession by the defendant or his predecessors in title, could not be urged against the remainderman, the plaintiff in this case, until the falling in of the precedent life estate. This objection was by the Court overruled and the plaintiff excepted.

To further maintain the issues upon his part the defendant offered in evidence the agreement of counsel made then and there in open Court, to the effect that the date of the probate of the will of
Henry Anderson in Lucas County, Ohio, was April 20th,
52 1860.

To further maintain the issues upon his part the defendant offered in evidence certified copies of eight deeds from the City Clerk of Toledo to Charles Butler, all dated March 26th, 1860, and which are in the words and figures following, to-wit:

3.

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March in the year one thousand eight hundred and sixty by and between Patrick J. Monahan as Clerk of the City of Toledo, County of Lucas, in the State of Ohio, of the one part and Charles Butler of the City of New York of the other part.

Witnesseth: That whereas the Treasurer of said City on the Twenty-seventh of December in the year one thousand eight hundred and forty-nine did sell according to the provisions of the Charter and Ordinances of said City in such case made and provided to Charles Dorr the following described lots situate in the City of Toledo for the vistula Grade Tax charged thereon for the year A. D. 1849, to-wit: Town lot number twenty (20) in the Vistula Division of the City of Toledo which said tax amounted to the sum of Sixty-six 54-100 Dollars and were forthwith paid by the purchaser to the City Treasurer and more than two years having elapsed from the time of said sale and the said premises so sold not having been redeemed and the certificate of sale to said Charles M. Dorr having been assigned and transferred to said Charles Butler and having been produced to me with the endorsement of the City Treasurer thereon that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as Clerk of the said City of Toledo, do hereby grant and convey to the said Charles Butler, his heirs and assigns forever the premises so sold as aforesaid. To have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof the said Patrick J. Monahan, Clerk of said City has hereunto set his hand officially and the corporate seal of said City on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN.
City Clerk.

Signed, sealed and delivered in the presence of

J. M. GLOYD.
53 GEORGE P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me the subscriber, a Notary Public in and for said County personally appeared Patrick J. Monahan, Clerk of said City of Toledo and as such acknowledged the within instrument to be his voluntary

and official act and deed for the purposes therein expressed. Given under my hand and official seal this twenty-seventh day of March, A. D. 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas Co., O.

Rec'd for Record April 2, 1860, and recorded same day.
JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, County Recorder of Lucas County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain Deed, recorded in Volume 34, of the Record of Deeds of said Lucas County, at page 6, which said Record of Deeds is in the office of County Recorder of said Lucas County, and is in my custody and control as such County Recorder.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said County, this 29th day of April, A. D. 1905.

(Signed) THOS. H. BARKDULL,
[SEAL.] *County Recorder of Lucas County, Ohio.*

5

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the Twenty-sixth day of March in the year one thousand eight hundred and sixty by and between Patrick J. Monahan as Clerk of the City of Toledo, County of Lucas, in the State of Ohio, of the one part and Charles Butler, of the City of New York, County and State aforesaid, of the other part, witnesseth: That whereas the Treasurer of said City on the twenty-seventh of December in the year one thousand eight hundred and forty-seven, did sell according to the provisions of the Charter and Ordinances of said City in such case made and provided to Charles W. Hill the following described lot situate in the City of Toledo for the Vistula Grade Tax charged thereon for the year 1847, to-wit: Town lot number thirty in the Vistula Division of the City of Toledo, which said tax amounted to the sum of ninety-nine 86.100 dollars and were forthwith
54 paid by the purchaser to the City Treasurer and more than two years having elapsed from the time of said sale and the said premises so sold not having been redeemed and the Certificate of Sale to the said Charles W. Hill having been by him assigned and transferred to the said Charles Butler and having been produced

to me with the endorsement of the City Treasurer thereon that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler I the said Patrick J. Monahan, as Clerk of the said City of Toledo, doth hereby grant and convey to the said Charles Butler, his heirs and assigns forever the premises so sold as aforesaid. To have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof, the said Patrick J. Monahan, Clerk of said City, has hereunto set his hand officially and the corporate seal of said City on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN, *City Clerk.*

Signed, sealed and delivered in the presence of

J. M. GLOYD.
GEORGE P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me the subscriber, a Notary Public in and for said County, personally appeared Patrick J. Monahan, Clerk of said City of Toledo, and as such acknowledged the within instrument to be his voluntary and official act and deed for the purposes therein expressed. Given under my hand and official seal this twenty-seventh day of March, A. D., 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas Co., O.

Rec'd for record April 2, 1860, and recorded April 3, 1860.

JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, County Recorder of Lucas County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain Deed, recorded in Volume 34, of the Record of Deeds of said Lucas County, at page 8, which said Record of Deeds is in the office of County Recorder of said Lucas County, and is in my custody and control as such County Recorder.

55 In testimony whereof, I have hereunto set my hand and affixed by official seal at Toledo, in said County this 29th day of April, A. D. 1905.

[SEAL.] (Signed) THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

8.

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March in the year one thousand eight hundred and sixty by and between Patrick Monahan as Clerk of the City of Toledo, County of Lucas, in the State of Ohio, of the one part and Charles Butler of the City of New York of the other part witnesseth: That whereas the Treasurer of said City on the Twenty-seventh of December in the year one thousand eight hundred and forty-seven did sell according to the provisions of the Charter and Ordinances of said City in such case made and provided to Charles M. Dorr the following described lot situate in the City of Toledo for the vistula Grade Tax charged thereon for the year A. D. 1847, to-wit: Town lot number thirty one, the Vistula Division of the City of Toledo which said tax amounted to the sum of Seventy-six 56-100 dollars, and were forthwith paid by the purchaser to the City Treasurer, and more than two years having elapsed from the time of said sale and the premises so sold not having been redeemed and the Certificate of Sale to the said Charles M. Dorr having been assigned, and transferred to the said Charles Butler and having been produced to me with the endorsement of the City Treasurer thereon that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler I, the said Patrick J. Monahan, as Clerk of the said City of Toledo, *doth* hereby grant and convey to the said Charles Butler his heirs and assigns forever, the premises so sold as aforesaid. To have and to hold the said premises hereby conveyed to the only proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof the said Patrick J. Monahan, Clerk of said City has hereunto set his hand officially and the corporate seal of said city on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of—
J. M. GLOYD.
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

56 Before me the subscriber, a Notary Public, in and for said County, personally appeared Patrick J. Monahan, Clerk of said City of Toledo, and as such acknowledged the within instru-

ment to be his voluntary and official act and deed for the purposes therein expressed.

Given under my hand and official seal this twenty-seventh day of March, A. D. 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas Co., O.

Rec'd for record April 2, 1860, and recorded April 3, 1860.

JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA.
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, County Recorder of Lucas County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain Deed, recorded in Volume 34, of the Record of Deeds of said Lucas County, at page 11, which said Record of Deeds is in the office of County Recorder of said Lucas County, and is in my custody and control as such County Recorder.

In testimony whereof I have hereunto set my hand and affixed my official seal at Toledo, in said County, this 29th day of April, A. D. 1905.

(Signed) THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

Certified Copy.

City of Toledo
to
Charles Butler.

This Indenture made the twenty-sixth day of March, in the year one thousand eight hundred and sixty by and between Patrick J. Monahan as Clerk of the City of Toledo, County of Lucas, in the State of Ohio, of the one part and Charles Butler of the City of New York, of the other part, witnesseth: that whereas the Treasurer of said City on the twenty-seventh day of December in the year one thousand eight hundred and forty-seven, did sell according to the provisions of the Charter and Ordinances of said City in such case made and provided, to Charles M. Dorr, the following described lot, situate in the City of Toledo, for the Vistula Grade Tax charged thereon for the year 1847, to-wit: Town lot number thirty-two (32) in the Vistula Division of Toledo which said tax amounted to the sum of seventy-six 56-100 dollars, and were forthwith paid by the purchaser to the City Treasurer, and more than two years
57 having elapsed from the time of said sale, and the said premises so sold not having been redeemed, and the certificate of sale to the said Charles M. Dorr having been assigned and transferred to the said Charles Butler and having been produced to me, with the

endorsement of the City Treasurer thereon that no money had been deposited with him for the redemption thereof. Now, in consideration of the premises, and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as Clerk of the said City of Toledo, do*th* hereby grant and convey to the said Charles Butler, his heirs anr assigns forever, the premises so sold as aforesaid. To have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever. In witness whereof, the said Patrick J. Monahan, Clerk of said City, has hereunto set his hand officially, and the Corporate seal of said City, on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of—

J. M. GLOYD.
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me, the subscriber, a Notary Public in and for said County, personally appeared Patrick J. Monahan, Clerk of said city of Toledo, and as such acknowledged the within instrument to be his voluntary and official act and deed for the purposes therein expressed. Given under my hand and official seal this twenty-seventh day of March, A. D. 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas Co., Ohio.

Received for record April 2, 1860, and recorded April 3, 1860.
JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Geo. E. Hamlin, County Recorder of Lucas County, in the state aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of the record of a certain deed, recorded in Volume 34 of the Record of Deeds of said Lucas county at page 13, which said Record of Deeds is in the office of County Recorder of said Lucas county, and is in my custody and control as such County Recorder.

In testimony whereof I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 7th day of December, A. D. 1906.

[Recorder's Seal, Lucas County, Ohio.]

GEO. E. HAMLIN,
County Recorder of Lucas County, Ohio.

58 STATE OF OHIO,
County of Lucas, ss:

I, Jason A. Barber, Presiding Judge of the Court of Common Pleas of Lucas County, in the State of Ohio, hereby certify that Geo. E. Hamlin, who signed the above certificate, was, at the time of signing the same, and is now the County Recorder of Lucas county, duly commissioned and qualified and, as such County Recorder, has the custody of the records of deeds and mortgages of said county; that said attestation is in due form, and by the proper officer, according to the laws of the state of Ohio, and that the above signature of said County Recorder is genuine.

Witness my hand and seal at Toledo, in said county of Lucas, this 8th day of December, A. D. 1906.

[Seal Common Pleas Court, Lucas County, Ohio.]

JASON A. BARBER,
Presiding Judge of the Court of Common Pleas,
Lucas County, Ohio.

STATE OF OHIO,
Lucas County, ss:

I, Ed. L. Kimes, Clerk of the Court of Common Pleas, in the state and county aforesaid, do hereby certify that Jason A. Barber who signed the above certificate, was, at the time of signing the same, and now is the duly elected, qualified, commissioner and acting presiding Judge, of the Common Pleas Court of said County, of Lucas.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Toledo, in said county, this 8th day of December, A. D. 1906.

[Seal Common Pleas Court, Lucas County, Ohio.]

ED. L. KIMES, *Clerk.*

Certified Copy.

City Clerk of Toledo
to
Charles Butler.

This indenture made the twenty-sixth day of March, in the year one thousand eight hundred sixty, by and between Patrick J. Monahan, as Clerk of the City of Toledo, County of Lucas, in the State of Ohio, of the one part, and Charles Butler, city of New York, of the other part, witnesseth, that whereas, the treasurer of said city, on the twenty-seventh of December, in the year one thousand eight hundred and forty-seven, did sell according to the provisions of the charter and ordinances of said city in such case made and provided to Charles M. Dorr, the following described lot, situate in

the city of Toledo, for the Vistula grade tax charged thereon, for the year A. D. 1847, to-wit:

Town lot number thirty-three (33) in the Vistula Division of Toledo, which said tax amounted to the sum of seventy-six
59 56-100 dollars, and were forthwith paid by the purchaser to the city treasurer, and more than two years having elapsed from the time of said sale, and the said premises so sold not having been redeemed and the certificate of sale to the said Charles M. Dorr having been assigned and transferred to the said Charles Butler, and having been produced to me with the endorsement of the city Treasurer thereon, that no money had been deposited with him for the redemption thereof. Now, in consideration of the premises, and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as clerk of the said city of Toledo, doth hereby grant and convey to the said Charles Butler, his heirs and assigns forever, the premises so sold as aforesaid. To have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever. In witness whereof the said Patrick J. Monahan, clerk of said city, has hereunto set his hand officially and the corporate seal of said city on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of—

J. M. GLOYD.
GEO. P. ESTE.

STATE OF OHIO,
Lucas County, ss:

Before me, the subscriber, a Notary Public, in and for said county, personally appeared Patrick J. Monahan, clerk of city of Toledo, and ss such acknowledged the within instrument to be his voluntary and official act and deed for the purposes therein expressed, given under my hand and official seal, this twenty-seventh day of March, A. D., 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas County, Ohio.

Received for record April 2, 1860 and recorded April 3, 1860.
JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Geo. E. Hamlin, County Recorder of Lucas County, in the state aforesaid, do hereby certify the above and foregoing to be a true and complete copy of the record of a certain deed, recorded in Volume 34 of the record of deeds of said Lucas county, at page 15 of which said record of deeds is in the office of County Recorder of said Lucas

county, and is in my custody and control as such County Recorder. In testimony whereof I have hereunto set my hand and affixed my official seal at Toledo, in said County this 7th day of December, A. D., 1906.

60 [Recorder's Seal, Lucas county, Ohio.]

GEO. E. HAMLIN.
County Recorder of Lucas County, Ohio.

STATE OF OHIO,
County of Lucas, ss:

I, Jason A. Barber, Presiding Judge of the Court of Common Pleas of Lucas County, in the State of Ohio, hereby certify that Geo. E. Hamlin, who signed the above certificate, was at the time of signing the same, and is now the County Recorder of Lucas County, duly commissioned and qualified, and as such County Recorder, has the custody of the records of deeds and mortgages of said County, that said attestation is in due form and by the proper officer according to the laws of the State of Ohio, and that the above signature of said County Recorder is genuine. Witness my hand and seal at Toledo, in said county of Lucas, this 8th day of December, A. D., 1906.

[Seal Common Pleas Court, Lucas County, Ohio.]

JASON A. BARBER.
Presiding Judge of the Court of Common Pleas, Lucas County, Ohio.

STATE OF OHIO,
Lucas County, ss:

I, Ed. L. Kimes, clerk of the Court of Common Pleas in the state and county aforesaid, do hereby certify that Jason A. Barber who signed the above certificate, was at the time of signing the same and now is the duly elected, qualified, commissioner and acting, presiding judge of the Common Pleas Court of said county of Lucas. In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Toledo, in said county, this 8th day of December, A. D., 1906.

[Seal Common Pleas Court, Lucas County, Ohio.]

ED. L. KIMES, *Clerk.*

9.

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March in the year one thousand eight hundred and sixty by and between Patrick Monahan as Clerk of the city of Toledo, county of Lucas in the state of

Ohio of the one part and Charles Butler — city of New York of the other part witnesseth: That whereas the treasurer of said city on the twenty-seventh of December in the year one thousand eight hundred and forty-seven did sell according to the provisions of the charter and ordinances of said city in such case made and provided to Charles M. Dorr the following described lot situate in the city of Toledo for the Vistula Grade Tax charged thereon for the year 1847 to wit.

Town lot number one thousand and eight (1008) in the
61 Vistula Division of the city of Toledo, which tax amounted to the sum of one hundred and sixty-six 42/100 dollars and were forthwith paid by the purchaser to the city treasurer and more than two years having elapsed from the time of said sale and the said premises so sold not having been redeemed and the certificate of sale to the said Charles M. Dorr having been assigned and transferred to the said Charles Butler and having been produced to me with the endorsement of the city treasurer thereon that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan as clerk of the said city of Toledo doth hereby grant and convey to the said Charles Butler his heirs and assigns forever the premises so sold as aforesaid. To have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler his heirs and assigns forever.

In witness whereof the said Patrick J. Monahan, clerk of said city has hereunto set his hand officially and the corporate seal of said city on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of—
J. M. GLOYD.
GEO. P. ESTE.

STATE OF OHIO,
Lucas County, ss:

Before me the subscriber a Notary Public in and for said county personally appeared Patrick J. Monahan, clerk of said city of Toledo and as such acknowledged the within instrument to be his voluntary and official act and deed for the purposes therein expressed. Given under my hand and official seal this twenty-seventh day of March, A. D. 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas County, Ohio.

Received for Record April 2, 1860 and recorded April 3, 1860.
JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, County Recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true,

perfect and complete copy of the record of a certain deed recorded in Volume 34, of the Record of Deeds of said Lucas county at page 20, which said Record of Deeds is in the office of County
62 Recorder of said Lucas County, and is in my custody and control as such County Recorder.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D. 1905.

THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

10.

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March in the year one thousand eight hundred and sixty by and between Patrick J. Monahan as clerk of the city of Toledo, county of Lucas in the state of Ohio of the one part and Charles Butler of the city of New York of the other part witnesseth: That whereas the treasurer of said city on the twenty-seventh day of December in the year one thousand eight hundred and forty-seven, did sell according to the provisions of the Charter and Ordinances of said city in such case made and provided to Charles M. Dorr the following described lot, situate in the city of Toledo for the Vistula Grade Tax charged thereon for the year 1847 to-wit: Town lot number one thousand and nine (1009) in the Vistula Division of the city of Toledo which said tax amounted to the sum of one hundred and ninety-nine 70/100 dollars and were forthwith paid by the purchaser to the city treasurer, and more than two years having elapsed from the time of said sale and the said lot so sold not having been redeemed and the certificate of sale to the said Charles M. Dorr having been by him assigned and transferred to the said Charles Butler and having been produced to me with the endorsement of the city treasurer thereon that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as clerk of the said city of Toledo doth hereby grant and convey to the said Charles Butler his heirs and assigns forever the premises so sold as aforesaid. To have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof the said Patrick J. Monahan of said city has hereunto set — hand officially and the corporate seal of said city on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of—
J. M. GLOYD.
GEO. P. ESTE.

63 STATE OF OHIO,
Lucas County, ss:

Before me the subscriber a Notary Public in and for said county personally appeared Patrick J. Monahan, clerk of said city of Toledo and as such acknowledged the within instrument to be his voluntary and official act and deed for the purpose therein expressed. Given under my hand and official seal this twenty-seventh day of March, A. D. 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas County, Ohio.

Receiver for Record April 2, 1860 and recorded April 3, 1860.
JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, County Recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed recorded in Volume 34, of the Record of Deeds of said Lucas county at page 22, which said Record of Deeds is in the office of County Recorder of said Lucas County, and is in my custody and control as such County Recorder.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D. 1905.

THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

Certified Copy.

City Clerk of Toledo
to
Charles Butler.

This indenture made the twenty-sixth day of March, in the year one thousand eight hundred and sixty, by and between Patrick J. Monahan, as clerk of the city of Toledo, county of Lucas in the state of Ohio of the one part and Charles Butler, of the city of New York of the other part, witnesseth That whereas the treasurer of said city, on the twenty-seventh day of December in the year one thousand eight hundred and forty-seven, did sell according to the provisions of the charter and ordinances of said city, in such case made and provided to T. H. Hough, the following described town lot, situate in the city of Toledo, for the special tax assessed for grading certain street as provided for by ordinance passed June 26, 1843, known as the Vistula special grade tax charged thereon for the year 1847, to-wit:

Town lot number 1008½, Vistula Division of Toledo, being all that piece of land or lot lying between lot 20 Vistula Division and lot 1008

Addition to Vistula being 21 feet front on Lynn street, run-
64 ning easterly 82½ feet from Lynn street, which said taxes amounted to the sum of forty-six 60-100 dollars, and were forthwith paid by the purchaser to the city treasurer. And more than two years having elapsed from the time of said sale, and the said *sale and the said* premises *so* sold not having been redeemed, and the certificate of sale to the said T. H. Hough, having been assigned and transferred by him to the said Charles Butler, and having been produced to me, with the endorsement of the city treasurer thereon, that no money had been deposited with him for the redemption thereof. Now, in consideration of the premises, and on the request of the said Charles Butler, I, the said Patrick J. Monahan as clerk of the said city of Toledo, doth hereby grant and convey to the said Charles Butler, his heirs and assigns forever, the premises *so* sold as aforesaid.

To have and to hold said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever. In witness whereof, the said Patrick J. Monahan, clerk of said city has hereunto set his hand officially and the corporate seal of said city *of* the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of:

J. M. GLOYD.
GEO. P. ESTE.

STATE OF OHIO,
Lucas County, ss:

Before me, the subscriber, a Notary Public, in and for said county, personally appeared Patrick J. Monahan, clerk of said city of Toledo and as such acknowledged the within instrument to be his voluntary and official act and deed for the purposes therein expressed. Given under my hand and official seal, this twenty-seventh day of March, A. D. 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas County, O.

Received for Record April 2, 1860 and recorded April 3, 1860.
JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Geo. E. Hamlin, County Recorder of Lucas County, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed recorded in Volume 34, of the Records of Deeds of said Lucas county, at page 21, which said record of deeds is in the office of County Recorder of said

Lucas county, and is in my custody and control, as such
65 County Recorder. In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county this 7th day of December, A. D. 1906.

[Seal. Recorder's Seal, Lucas County, Ohio.]

GEO. E. HAMLIN,
County Recorder of Lucas County, Ohio.

STATE OF OHIO,
Lucas County, ss:

I, Jason A. Barber, Presiding Judge of the Court of Common Pleas of Lucas County, in the State of Ohio, hereby certify that Geo. E. Hamlin, who signed the above certificate, was, at the time of signing the same, and is now the County Recorder of Lucas County, duly commissioned and qualified, and as such County Recorder has the custody of the records of deeds and mortgages of said county; that said attestation is in due form and by the proper officer, according to the laws of the state of Ohio, and that the above signature of said County Recorder is genuine. Witness my hand and seal at Toledo, in said county of Lucas, this 8th day of December, A. D. 1906.

[Seal Common Pleas Court, Lucas County, Ohio.]

JASON A. BARBER,
Presiding Judge of the Court of Common Pleas, Lucas County, Ohio.

STATE OF OHIO,
Lucas County, ss:

I, Ed. L. Kimes, clerk of the Court of Common Pleas in the state and county aforesaid, do hereby certify that Jason A. Barber who signed the above certificate was at the time of signing the same and now is the duly elected, qualified, commissioner and acting presiding judge of the Common Pleas Court of said county of Lucas. In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Toledo, in said county, this 8th day of December, A. D. 1906.

[Seal Common Pleas Court, Lucas County, Ohio.]

ED. L. KIMES, *Clerk.*

To the introduction of these documents, the plaintiff when defendant offered the same separately objected upon the ground of immateriality, irrelevancy and incompetency, and for the reason that the regularity of the proceedings precedent to the execution of said deed and the authority for their execution, is not shown and that such must first be shown, before the said tax deeds could become admissible in evidence.

Said objection was by the court overruled, with the understanding that the introduction of said deeds was to be followed by proof show-

ing the regularity of the antecedent proceedings; to such action of the court, the plaintiff excepted.

66 The defendant, in order to further maintain the issues on his part introduced and offered in evidence certain books, documents, records, papers and files from the office of the Clerk of the City of Toledo, Ohio, which were by the plaintiff in open Court duly admitted to be the original books, documents, records, papers and files, kept or recorded in the City Clerk's office, of the City of Toledo, Ohio, but to the introduction in evidence of which the plaintiff then and there in open Court duly objected to each and every one of them separately and severally on the ground and for the reason that each was incompetent, irrelevant and immaterial but the Court overruled said objections and each of them and admitted the same in evidence; to which action of the Court the plaintiff then and there in open Court duly, separately and severally excepted to the action of the Court in admitting each and every one of said books, documents, records, papers and files.

The said books, documents, records, papers and files so introduced in evidence are the following, namely:

1st. Record of an ordinance passed March 4, 1841, recorded in the record of ordinances, Volume 1, page 59 to 61, marked "Exhibit A."

2. Record of an ordinance passed October 23rd, 1841, recorded in Volume 1 of the record of ordinances, pages 71 and 72, marked "Exhibit B."

3. Record of a resolution passed February 4, 1843, recorded in record of resolutions, p. 90, marked "Exhibit C."

4. Record of an ordinance passed June 26, 1843, recorded in record of ordinances, Volume 1, pages 84 to 87, marked "Exhibit D."

5. Record of an ordinance passed November 7, 1843, Volume 1, of the record of ordinances, page 87, marked "Exhibit E."

6. Record of a resolution passed December 23, 1847, resolution record book B, page 172, marked "Exhibit F."

7. Record of proceedings of the Council of the City of Toledo, dated January 10, 1843, recorded in resolution book A, under said date, marked "Exhibit G."

8. Original files of the Council proceedings of resolution passed January 10, 1843, with the original oaths upon the same, of Samuel Allen and Samuel B. Scott, dated January 24, 1843, and affirmation of Isaac S. Smith, dated January 26th, 1843, marked "Exhibit H."

9. Additional original oaths of Samuel Allen and Samuel B. Scott, dated February 2, 1843, marked "Exhibit I."

67 10. Original additional affirmation of Isaac S. Smith, dated January 15, 1843, marked "Exhibit J."

11. Notice of the proposed improvement, copy of which is hereto attached, dated January 11th, 1843, and it was agreed by both parties in open Court that the said notice was published for six consecutive weeks, in the Toledo Blade, a newspaper then published in the City of Toledo, Ohio, said first publication being January 13th, 1843, and the last on Febraury 17th, 1843, and that said publication might be treated as having been proven, marked "Exhibit K."

12. Record of proceedings of the City Council of Toledo, dated

February 18, 1843, recorded in Book A, as of said date on an unnumbered page, marked "Exhibit L."

13. Record of proceedings of the Council of the city of Toledo, dated May 10th, 1843, recorded in record book A, on said date on an unnumbered page, marked "Exhibit M."

14. Original report dated March 25th, 1843, of the special Committee, composed of Samuel B. Scott, Isaac S. Smith and Samuel Allen, appointed to estimate the expenses, costs and damages for making the improvement and to make an assessment under resolution of the Council of the City of Toledo, passed January 10, 1843, together with the map attached to and made part of said report, marked "Exhibit N."

By consent of all parties the lots and lands, shown in said report, located at a distance from the lands involved in this action, together with the amounts charged against such lots and lands, need not be made part of this bill of exceptions, and for said reasons the same is not given in the copy of said report, marked "Exhibit O."

15. Record of proceedings of the Council of the City of Toledo, dated March 20, 1843, recorded in book A, under said date on an unnumbered page, marked "Exhibit P."

16. Record of proceedings of the Council of the City of Toledo under date of April 4th, and 8th, 1843, recorded in Volume A under said date on an unnumbered page.

It was admitted in open Court by both parties that on April 25th, 1843, James M. Comstock, as the Treasurer of the City of Toledo, duly gave bond as required by law, which bond was by the Council duly accepted and approved, marked "Exhibit Q."

68 17. Record of proceedings of the Council of the City of Toledo, dated May 4, 1843, recorded in Book A, under said date on an unnumbered page, marked "Exhibit R."

18. Record of the report of O. B. Olmstead, John B. Freeman and Peter Palmer, Special Committee, dated May 15th, 1843, record marked Resolution book 1837 to 1843, pages 102 to 106 inclusive, marked "Exhibit S."

19. Also Tax duplicate for the year 1843, including the description of lots and lands, the warrant and certificate on the duplicate, marked "Exhibit T."

20. Also Tax record for the year 1843, marked "Exhibit U."

21. Also Tax duplicate for the year 1844, including description of lots and lands, warrant and certificate on the same, marked "Exhibit V."

22. Also Tax record for the year 1844, marked "Exhibit W."

23. Also Tax duplicate for the year 1845, including description of lots and lands, warrant and certificate on the same, marked "Exhibit X."

24. Also Tax record for the year 1845, including certificates descriptions of lots and lands, return and affidavit on the same, marked "Exhibit Y."

25. Also Tax duplicate for the year 1846, including description of lots and lands, warrant and certificates on the same, marked "Exhibit Z."

26. Also Tax record for the year 1846, including description of lots and lands, warrant, three certificates and notice on same, marked "Exhibit A. A."

27. Also Tax duplicate for the year 1847, including description of lots and lands, warrant and certificates for the same, marked "Exhibit B. B."

28. Also Tax record for the year, 1847, including description of lots and lands and certificates on the same, pages 137½ to 230, marked "Exhibit C. C."

29. Also the record of the lots returned delinquent by the Treasurer, for the year 1846, together with certificate upon the same, pages 270 to 275, marked "Exhibit D. D."

30. Also the record of the delinquent list dated October 1st, 1847, together with the certificate of the City Clerk of the City of Toledo, and also the notice of the tax sale and the Clerk's certificate attached to the same, which was recorded in the tax record for the year 1846 and 1847, pages 264 to 275 inclusive, marked "Exhibit D. D. continued."

69 31. Record of Tax sales on Monday, 27th day of December, 1847, found in the tax record for the year 1846, and 1847, on pages 311 to 322 inclusive, including the certificate of Charles I. Scott, Clerk of the City of Toledo, as found on pages 311 to 313 of said record, marked "Exhibit E. E."

True, full and correct copies of said resolutions, ordinances, reports, tax proceedings, duplicates, record, warrants, certificates, returns, notices, papers, books, and files, so far as the same relate to or effect the land in question, being the whole of such books, documents, excepting the reports, duplicates, records and returns and the whole of them, excepting the lots and lands shown thereon, not involved in this action, and the taxes charged against the same, are by agreement of parties omitted from said copies. Said copies are marked consecutively Exhibits A. to Z. and A. A. to E. E. inclusive, and are respectively as follows:

"Exhibit A."

11.

An Ordinance to Regulate the Grading of the City of Toledo.

Sec. 1st. Be it ordained by the Mayor and Council of the city of Toledo, "That whenever a majority of the resident owners of the ground bounding and abutting on any street, lane or alley, or part of any street, lane or alley within the city of Toledo, shall make application in writing to the City Council to have said street, lane or alley or such part thereof graded; The Council shall proceed to appoint a committee of three disinterested, judicious free holders of said city to estimate the costs of making such grade and to assess the expense of the same on the land and ground bounding and abutting as aforesaid on such street, lane or alley, or such part thereof as may be embraced in the application for such grade, and

also on the lands and grounds near thereto in proportion to the benefit to be derived from such improvement.

SEC. 2d. That each of said committee, previous to entering upon his duties, shall take and subscribe an oath or affirmation before the Mayor or other proper officer that he shall faithfully and impartially discharge the duties imposed upon him by the Ordinance to the best of his skill and ability.

SEC. 3d. That it shall be the duty of said committee to estimate the cost of any such projected improvement and to assess the expense on the land and ground as aforesaid, and the City Council shall give notice in one of the newspapers published in said city or vicinity for six consecutive weeks, of the improvement to be made in order that any one damaged by reason of said improvement may file his claim in writing in the office of the city clerk, within ten days after the expiration of the said six weeks' notice, and the said committee shall assess the damage of such claimant and shall add the same to the cost of the improvement as a part of the expense thereof to be assessed, and said committee, within twenty days after the time shall have expired for filing claims for damages, shall make return to the office of the treasurer, setting forth the estimated costs of such projected improvement, in the manner required by the 28 section of the City Charter, and the said council shall (if they therefore order and direct the improvement to be made) direct the city treasurer to perform the duties required of him by the 28th section, in relation to the matter in the way prescribed in said section. And the said collector shall perform all the duties required of him by said section, and when the improvement so ordered shall be completed, each claimant as above mentioned shall be entitled to receive from the city treasurer the amount of damage so by the return of said committee awarded them and City Council shall take all further steps requisite fully to carry into effect said 28 section of the charter.

SEC. 4th. That whenever the City Council shall determine to grade any street, lane or alley in the city of Toledo, or any part thereof under this ordinance, the Street Commissioner shall and is hereby directed to receive proposals and to make contracts for such grading and which shall in all cases be done under the superintendence and direction of said Street Comissioner who shall have the power to accept or receipt the same when finished, and in case of rejection to re-grade the same at the costs of the person or persons contracting to perform such grading, but in making such contracts the Street Commissioner shall in all cases give preference to the person or persons owning the lots and ground assessed for the performance of such grading, provided such person or persons will agree to perform such grading at an expense not exceeding the amount of taxes assessed upon such lot or lots and ground for that purpose.

W. H. TILDEN, *Mayor.*

Passed March 4, 1841.

Attest:
EDSON ALLEN.

12.

"Exhibit B."

An Ordinance to Amend an Ordinance entitled, "An Ordinance to Regulate the Grading of the City of Toledo."

71 Sec. 1. Be it ordained by the Mayor and Council of the City of Toledo that it shall be lawful for the Council, without application for that purpose, as required by the First Section of the Ordinance hereby amended, at any time when they shall deem that the interest of the City requires it, to enforce the grading of any street, lane or alley within the bounds of said City, and to appoint three Commissioners as specified in said First Section to make the estimate and assessment therein directed, and which committee shall be governed in the discharge of their duties by the provisions of said Ordinance anything therein contained to the contrary notwithstanding.

M. H. TILDEN, *Mayor.*

Passed October 23, 1841.

Attest:
EDSON ALLEN, *Clerk.*

Vol 1. City Ordinances, 71-72.

13.

"Exhibit C."

Resolution Book for the years 1837 to 1843, Page 90.

"Resolution, &c."

That Summit Street be graded from Monroe Street to Jefferson Street on an inclined plane, from Jefferson Street to Madison Street on an inclined plane, from Madison Street to Adams Street on an inclined plane from Adams Street to Oak Street on an inclined plane, from Oak Street to Cherry Street on an inclined plane, from Cherry Street to Walnut Street on an inclined plane, from Walnut Street to Locust Street on an inclined plane, from Locust Street to Lagrange Street on an inclined plane, from Lagrange Street, to Elm Street on an inclined plane, and that the several streets be graded and arched between the several points above named in such manner as the Street Commissioner for the time being shall direct. The undersigned refer also to map accompanying this report.

(Signed) EDWARD BISSELL.
SAM'L ALLEN.

Toledo, February 4, 1843.

The above is a report of said two as commissioners appointed.

16.

"EXHIBIT D."

An Ordinance to Amend an Ordinance entitled, "An Ordinance to regulate the Grading of the City of Toledo," passed March 4, 1841, and for other purposes.

SEC. 1. Be it ordained by the Mayor and Council of the City of Toledo that Water Street, from the easterly line of Monroe
72 Street, in the Port Lawrence Division of said City to the easterly line of Lagrange Street in the Vistula Division thereof, and Summit Street from said easterly line of Monore Street to the easterly line of Elm Street in said Vistula Division of said City, and of cross streets running from said Summit Street to or toward the Maumee River be, and they are hereby directed and ordered to be graded and improved in the manner and on the plan reported by Samuel Allen, Samuel B. Scott and Isaac S. Smith, a committee heretofore appointed for that purpose, and the said Treasurer is hereby directed and required to annex the duplicate of taxes heretofore assessed by said special committee for said improvement to the annual assessment roll and deliver the same with annual assessment roll to the City Collector on or before the first Monday in July next; and it shall be the duty of said collector to collect the said taxes so assessed for said improvement, at the same time and in the same manner as the annual taxes of said City are required to be collected, and he shall pay the tax so collected into the "City Treasurer," and in all respects take the same proceedings as in the collection of the annual taxes of said City.

SEC. 2d. And be it further ordained that the said City Treasurer shall keep the fund so to be collected distinct from the general fund of said City and the same shall be exclusively appropriated and pledged for the purpose of making such improvement, and the same shall only be drawn on a warrant of the Mayor, countersigned by the Clerk specifying that the same is drawn for the purpose aforesaid.

SEC. 3d. And it is further ordained that it shall be the duty of the Street Commissioner after having given the proper public notice to proceed to let contracts for making such improvement, payment being demandable out of the fund as aforesaid; said contract shall be in writing and a copy shall be deposited with the Clerk for the use of the Council.

The Mayor shall draw his warrant on the fund aforesaid, only in pursuance of the certificate of the Street Commissioner who shall keep true and accurate accounts and minutes of his proceedings and report the same to the Council as often as once in thirty days.

SEC. 4. Be it further ordained that any person chargeable with a tax shall be at liberty to discharge the same by work, labor and materials under the superintendence of the Street Commissioner, provided, he, she or they shall become the contractor.

SEC. 5. Be it further ordained that the City Clerk procure
73 a proper book, and therein record all surveys, maps, and plats of existing streets, alleys, market places, squares, wharfs, slips and public grounds, now existing or heretofore laid out or altered; but that this and all other reports relating to the establishment of grade and special improvement be recorded in the City Clerk's Office for the use of the City and all other persons interested therein.

JAMES MYERS, *Mayor.*

Passed June 26, 1843.

Attest:

EDSON ALLEN, *Clerk.*

17.

"EXHIBIT E."

An Ordinance to Repeal certain Parts of an Ordinance passed the 26 June, 1843, entitled, an Ordinance to amend an Ordinance to regulate the Grading of the City of Toledo, passed March 4, 1841, and for other purposes.

SECTION 1. Be it ordained by the Mayor and Council of the City of Toledo, that, that part of the above recited Ordinance passed June 26, 1843, authorizing the grading of Water and Summit Streets from the Easterly line of Adams Street to Monroe Street and Jefferson, Madison and Adams Streets from Water Street to Summit Street be and is hereby repealed. Passed November 7, 1843.

JAMES MYERS, *Mayor.*

EDSON ALLEN, *Clerk.*

Vol. 1, City Aids, 87.

18.

"EXHIBIT F."

Resolutions, &c.

By ALD. MYERS: That Alderman Segur be and he is hereby appointed to attend the tax sale on Monday next, for the sale of town lots and lands for City taxes for assessments made under the present amended charter, and bid off such lots and lands as the city are required to bid off by the terms of the City Charter. Adopted.

Attest:

C. I. SCOTT, *City Clerk.*

The above resolution comes under a special meeting of date Thursday, December 23, 1847, 7 o'clock P. M.

30.

"EXHIBIT G."

Special Meeting, January 10th, 1843.

7 O'CLOCK P. M.

Called by the Mayor.

Present: Alderman E. Bissell, L. Bissell, Crane, Flagg, Mount, Fitch and Palmer.

The Mayor absent.

On motion Ald. Fitch was appointed President of the Council.

Alderman E. Bissell offered the following resolutions which were adopted.

74 Resolution by the Mayor and Council of the City of Toledo that the bulkhead be constructed on the southerly side or line of Water Street in the said City of Toledo from its intersection with Lagrange Street, to its intersection with Monroe Street in all that portion of said Water Street that may be necessary for the purpose of retaining that earth to be filled into Water Street as hereinafter provided for; and further that said Water Street be graded by filling in the same from its intersection with Lagrange Street to its intersection with Monroe Street and that the costs, expenses and damages of making such improvements be assessed on said Water Street, or near thereto as provided for in an ordinance passed by the Council of the City of Toledo of the 4th day of March, 1841, an amendment to said Ordinance passed on the 23rd day of October, 1841.

Resolved: That Summit Street in the City of Toledo be graded from its intersection with Elm Street to its intersection with Monroe Street, and that the cost, expense and damage of making said grading be assessed upon the lots and abutting upon said Summit Street or near thereto, as provided for in an Ordinance passed by the Common Council of the City of Toledo on the 4th day of March, 1841, an amendment to said ordinance passed on the 23rd day of October, 1841.

Resolved: That each of the following streets in the City of Toledo be graded, to-wit: Pine Street, Locust Street, Lagrange Street, Cedar Street, Elm Street, "Sycamore" Street, Walnut Street, Vine Street, Cherry Street, Lynn Street, Oak Street, Adams Street, Madison Street, Jefferson Street and Perry Street with their intersection with Water Street to the intersection with Summit Street and that the costs, expenses and damages of making such grades on each of said streets be assessed upon the lots and lands bounding and abutting on each of said streets or near thereto as provided for in a certain ordinance passed by the Council of the City of Toledo on the 4th day of March, 1841, and an amendment to such ordinance passed on the 23rd day of October, 1841.

Resolved: That the bulkhead be constructed and grading be done under the direction of the Street Commissioner.

Resolved, That Isaac S. Smith, Samuel B. Scott, Samuel Allen

be, and they are hereby appointed a committee to estimate the costs, expenses and damages of making such improvements, and to make the assessment required by law in the premises and that they be entitled each to the sum of $3 per day for their services as such assessors to be paid out of the said treasury upon the warrant of the Mayor.

Notice of the aforesaid improvements ordered to be given in the Toledo Blade for six consecutive weeks.

On motion of Ald. Flagg the Council adjourned to meet Tuesday 17 inst. at 7 o'clock p. m.

JOHN FITCH,
President of the Council.

Attest:
EDSON ALLEN, *Clerk.*

Res. Book A, Jany. 10, 1843.
From Original Files.

"EXHIBIT H."

Resolved by the Mayor and Council of the City of Toledo. That a bulkhead be constructed on the southerly side or line of Water Street in the said City of Toledo from its intersection with Lagrange Street to its intersection with Monroe Street in all that portion of said Water Street that may be necessary for the purpose of retaining the earth to be filled into Water Street as hereinafter provided for, and further that said Water Street be graded by filling in the same from its intersection with Lagrange Street, to its intersection with Monroe Street, and that the costs, expenses and damages of making said improvements be assessed upon the lots bounding and abutting on said Water Street or near thereto as provided for in an ordinance passed by the Common Council of the City of Toledo on the 4th day of March, 1841, and an amendment to said ordinance passed on the 23rd day of October, 1841.

Resolved, that Summit Street in the City of Toledo be graded from its intersection with Elm Street to its intersection with Monroe Street and that the costs, expenses and damages of making said grade be assessed upon the lots bounding and abutting upon said Summit Street or near thereto as provided for in a certain Ord. pass. by the Com. Coun. of the City of Toledo, on the 4th day of March, 1841, and an amendment to said ordinance passed on the 23rd day of October, 1841.

Resolved: That each of the following streets in the City of Toledo be graded to-wit: Pine Street, Locust Street, Lagrange Street, Cedar Street, Elm Street, Sycamore Street, Walnut Street, Vine Street, Cherry Street, Lynn Street, Oak Street, Adams Street, Madison Street, Jefferson Street and Perry Street from their intersection with Water Street to their intersection with Summit Street, and that the costs, expenses and damages of making such grades on each of said streets be assessed upon the lots and lands bounding and abutting on each of said streets or near thereto as provided for in a certain ordi-

nance passed by the Council of the City of Toledo on the 4th day of March, 1841, and an amendment to said ordinance passed on the 23rd day of Oct. 1841.

76 Resolved, that the bulkhead be constructed and grading be done under the direction of the Street Commissioner.

Resolved: That Isaac S. Smith, Samuel B. Scott and Samuel Allen be and they are hereby appointed a committee to estimate the costs expenses and damages of making said improvements and to make the assessments required by law in the premises and that they be entitled each of them to the sum of three dollars per day for their services as such assessors to be paid out of the City Treasury upon the warrant of the Mayor.

STATE OF OHIO,
Lucas County, City of Toledo, ss:

We Samuel Allen and Samuel B. Scott do swear that we will well and faithfully perform all the duties imposed upon us under and by virtue of the above appointment.

S. ALLEN.
SAML. B. SCOTT.

Sworn before me this 24 day of January, 1843.

C. M. DORR,
Notary Public, Lucas Co., O.

I, Isaac S. Smith do also solemnly affirm that I will also perform all the duties required of me by virtue of the aforesaid appointment to the best of my ability.

ISAAC S. SMITH.

Affirmed before me this 26 Jany. 1843.

CHAS. M. DORR,
Notary Public, Lucas Co., O.

The foregoing is from the original paper.

The above paper is endorsed: Abl E. Bissell. Grading Resolution Adopted Jany. 10, 1843. Grade. See oaths of Grade Committee within. R. P. 91 and 92. Box No. 4. File No. 619.

"EXHIBIT I."

STATE OF OHIO,
Lucas County, ss:

Mr. Samuel Allen and Samuel B. Scott of Toledo, county aforesaid, do solemnly swear that we will support the Constitution of the State of Ohio, and faithfully and impartially discharge the duties of grade committee appointed by the council of said city on the tenth day of January, eighteen hundred and forty-three to estimate

the costs, expenses and damages of making certain improvements in said city according to resolution of said council passed on the same tenth day of January, 1843.

S. ALLEN,
SAMUEL B. SCOTT.

Subscribed and sworn to before me this 2d day of February, one thousand eight hundred and forty three.

MAYOR BRIGHAM,
Justice of the Peace.

77 "EXHIBIT J."

STATE OF OHIO,
Lucas Co., ss:

I, Isaac S. Smith of Toledo, county aforesaid, do solemnly affirm that I will support the constitution of the State of Ohio and faithfully and impartially discharge the duties of and as one of the Grade Committee appointed by the Common Council of said city on the tenth day of January, eighteen hundred and forty three, to estimate the costs, expenses, and damages of making certain improvements in said city according to resolution of said council passed on the aforesaid tenth day of January, 1843.

ISAAC S. SMITH.

Subscribed and affirmed to before me this fifteenth day of February A. D. 1843.

MAYOR BRIGHAM,
Justice of the Peace.

"EXHIBIT K."

(Publication of Proposed Improvement.)

"Notice is hereby given, that — a special meeting of the council of the city of Toledo, on the 10th day of the current month, resolutions were passed, providing for the following named improvements in said city, agreeably to the 28th Section of the charter of said city, to-wit: That a bulk-head be constructed on the Southerly side or line of Water street in said city of Toledo, from its intersection with La Grange street to its intersection with Monroe street, in all that portion of said Water street that may be necessary for the purpose of retaining the earth to be filled into Water St., as hereinafter provided for; and that said Water street be graded by filling in the same, from its intersection with La Grange street to its intersection with Monroe street; and that the cost, expenses and damages of making said improvement, be assessed upon the lots bounding and abutting on said Water street, or near there to, as provided for in an ordinance passed by the council

of the city of Toledo, on the 4th day of March, 1841, and an amendment to said ordinance, passed as aforesaid on the 23d day of October, 1841.

And that Summit street in said city be graded from its intersection with Elm street, to its intersection with Monroe street, and that costs, expenses and damages of making said grade, be assessed upon the lot bounding and abutting upon said Summit street, or near thereto, as provided for in a certain ordinance passed by the council of said city, on the 4th day of March, 1841 and an amend-
78 ment to said ordinance, passed as aforesaid, on the 23d day of October, 1841.

And that Pine street, Locust street, La Grange street, Cedar street, Elm street, Sycamore St., Walnut St., Vine St., Cherry St., Lynn St., Oak street, Adams St., Madison St., Jefferson St. and Perry street, be graded from their intersection with Water street, to their intersection with Summit street, and that the costs expenses and damages of making such grades, on each of said streets, be assessed upon the lots and lands bounding and abutting on each of said streets, or near thereto, as provided for in an ordinance, passed by the council of said city on the 4th day of March, 1841, and an amendment to said ordinance passed as aforesaid, the 23d day of October, 1841.

Any person damaged by reason of said improvements, may file his claim in writing in the office of the city clerk, within 10 days after the 28th day of February, next, to be acted on by a committee appointed by said council, for that purpose.

By order of the council.

EDSON ALLEN, *Clerk*.

Toledo, Jan. 11th, 1843."

(The above notice was published in the Toledo Blade January 13th, 20th and 27th, February 3d, 10th and 17th in year 1843 as appears from the files of said paper in Toledo Public Library).

"EXHIBIT L."

31.

Record Book "A," Unnumbered page.

Special Meeting, February 18, 1843, 7 o'clock p. m.

Present: Ald. E. Bissell, L. Bissell, Crane, Flagg, Fitch, Mount and Palmer, absent the Mayor.

Ald. Fitch was appointed president of the council.

Ald. Flagg offered the following resolutions which were adopted, (then follows several resolutions in regard to elections.)

Resolved: By the Mayor and Council of the city of Toledo that the map now in the hands of the Recorder of Lucas Co., Ohio, made by Robert Gower be adopted as the city map of Toledo in accordance with the provisions of the 28th Section of the city charter.

Resolved: That the city clerk procure a suitable book and record the same therein (the two last resolutions offered by Ald. E. Bissell).

On motion of Ald. E. Bissell the council adjourned to meet the 21st day of the current month at 7 o'c. p. m.

JOHN FITCH,
Prest. of the Council.

Attest:
EDSON ALLEN, *Clerk.*

79 "EXHIBIT M."

32.

Record Book "A." Unnumbered page.

An adjourned meeting, May 10, 1843, 1 o'c. P. M.

Meeting of the council to further equalize the assessment Rolls.

Present: The Mayor and Alderman Clark, Goettel, Keeler, Mason & Walbridge.

Absent, Alderman Johnston & Palmer, Peckham & Freeman.

Ald. Clark & Goettel, from the special committee to whom had been referred the assessment rolls, reported the same back recommending alterations in the descriptions of parts of lots, report accepted.

To the Mayor and Council of the city of Toledo:

The undersigned a special committee appointed and to which was referred the assessment rolls of the city of Toledo respectfully ask leave to report the following alterations as hereinafter specified for the 1 ward the committee recommend that the description of lots 713 and 714 taxes to E. & W. Irvin be amended so as to read the north 1/3 of each and the South 1/3 of the same and that there be abated on Lot 779 the amount taxes for improvements—And also on lots 531, 532, 160, 114 and the North 1/3 of lots 665, 666 and 667—and that the description on the assessment rolls be altered from the West 1/3 to North 1/3 of each, on lots 665, 666 and 667, the committee not having time to report in full beg leave to be discharged from the further consideration of the subject.

(Signed) IRA L. CLARK,
HENRY W. GOETTEL.

Toledo, May 10, 1843.

After some time spent in equalizing the assessment Rolls, on motion the said Rolls were referred to Ald. Mason, Goettel and Clark for examination and to report thereon at the next meeting.

Council adjourned to meet Friday the 12th inst. at 1/2 past 6 o'c P. M.

JAMES MYERS,
Mayor of the City of Toledo.

Attest:
EDSON ALLEN, *Clerk.*

"EXHIBIT N."

To the Treasurer of the city of Toledo:

The undersigned appointed by the city council of Toledo on the tenth day of January 1843 to estimate the costs of constructing a bulk head in Water street, and grading and filling in certain streets as and detailed in said resolutions

80 Report as follows.

We recommend that a bulk head be constructed on the Southerly line of Water street, in the following manner, and as shown by the annexed diagram.

A row of white oak piles to be driven at intervals of four feet from center to center, about eight feet into the bottom, leaving the tops eight feet above water; the piles to be one foot at least in diameter at the small ends, the upper ends to be tenoned into cap pieces of foot square white oak timber; the cap pieces to be fastened down on to the piles.

The land side of the piles to be lined from the bottom to the top with three inch, straight edged plank, the plank below the surface for one or two feet, and all those above the surface of the water, to be white oak.

Each pile to be secured with two white oak ties, each about twenty-five feet long, eight inches diameter at the small end. One of the ties to be fastened to the pile by a gain and dovetail and a two inch dowel, at or near the surface of the water, projecting horizontally and be secured in that position in the earth embankment which is to be made on the north side of the bulk head. The second tie in each pile to be secured in like manner four feet above the water.

In the front of each block of lots on the river there should be a culvert or sluice about two feet under water, of white oak three inch plank, the culvert in the inside to be one foot wide, two feet high, extending through the bulk head and embankment of Water street.

We estimate the cost of the bulk head including contingent expenses at $5,*47.98

Page 104 blue print, omitted.

The cost of excavations, transportations and embankments, including all contingent expenses at $37,931.53

Total of cost $42,979.42

Which amount we assess upon the several lots of land and Water lots, as designated in figures on the map hereto annexed and known by the same numbers (excepting the fractional numbers) on the map of the city of Toledo, recorded in the clerk's office, to which map we refer for a more exact description of each lot.

The following schedule exhibits the names of the supposed own-

ers of the several lots, and parts of lots, the numbers, and the amount assessed on each and the division of the city in which they are located.

81

Owners.	Nos.	Location & remarks.	Am't assessed
Edward Bissell	18	Vistula	$66.57
"	19	Vistula	66.57
"	30	Vistula	99.86
"	31	Vistula	76.56
"	32	Vistula	76.56
"	33	Vistula	76.56
"	34	Vistula	76.56
Sidney Bissell	1000	Vistula	499.27
"	1001	Vistula	549.20
"	1007	Vistula	166.42
"	1009	Vistula	199.70
State of Ohio	20	Vistula	66.57
Unknown	1008½	Vistula	46.60
Total			$42,979.42

Toledo 25 March, 1843.
(Signed) ISAAC S. SMITH,
SAMUEL B. SCOTT,
SAML ALLEN.

"EXHIBIT O."

Record Book "A," Unnumbered Page.

Adjourned Meeting March 20, 1843.

Present: Mayor & Alderman Clark, Crane, Flagg, Freeman, Johnston, Olmstead, Peckham and Palmer.

The council then on motion proceeded to make the following appointments. Thomas D. Thomas, Collector and Marshal.

M. H. TILDEN, *Mayor.*

Attest:
EDSON ALLEN,
Clerk Pro Tem.

"EXHIBIT P."

Stated Meeting, April 4, 1843.

Present: The Mayor and Alderman Clark, Freeman, Flagg, Johnston, Olmstead and Peckham, and Alderman elects Goettel, Keeler and Palmer from the 3d ward Mr. Goettel produced his commission having been sworn by James W. Whitney, Esq.

Mr. Keeler and Palmer were sworn by the Mayor.

On motion proceeded to make the following appointment by ballot, to-wit: James M. Comstock, Treasurer.

Thomas D. Thomas was sworn by the Mayor as Marshal and collector.

On motion of Ald. Palmer, Council adjourned on Saturday the inst. at 6 o'c. P. M.

Attest:

EDSON ALLEN,
Clerk pro Tem.

82 "EXHIBIT Q."

Record Book "A" at Unnumbered Page.

Special Meeting, April 8, 1843.
Called by the Mayor.

8 o'c. P. M.

Present: The Mayor and Alderman Clark, Flagg, Freeman, Johnston, Keeler, Olmsted, Palmer and Peckham.

Absent: Ald. Goettel.

James M. Comstock was sworn by the — as City Treasurer for the ensuing year.

Attest:

EDSON ALLEN, *Clerk.*

It was admitted in open court by counsel for Plaintiff that on Apl. 25th, 1843, the Treasurer duly gave bond as required by law which bond was by the council duly accepted and approved.

"EXHIBIT R."

Record Book A, Unnumbered Page.

May 4, 1843, 7 o'c. P. M. 1 Thursday in May.

Meeting of the council for the purpose of equalizing the tax assessments Rolls for the city for 1843.

Present: The Mayor and Alderman Clark, Freeman, Goettel, Johnston, Keeler and Peckham.

Absent: Alderman Palmer.

The three assessments rolls for the three wards in the city of Toledo for 1843 were presented and accepted.

On motion of Alderman Clark the said assessment Rolls were referred to Alderman Clark, Peckham and Goettel for examination.

On motion of Alderman Peckham, the council adjourned to meet on Tuesday the 9th inst., at 6 o'c. P. M.

JAMES MYERS, *Mayor.*

Attest:

EDSON ALLEN, *Clerk.*

May 9, 1843, adjourned to meet May 10, 1843.

JAMES MYERS, *Mayor.*

"EXHIBIT S."

Resolution Book 1837-1843, Pages 102 to 106.

Resolution.

To the Mayor and Common Council of the city of Toledo:

The special committee to whom was referred the subject of *the* grading certain streets, beg leave respectfully to submit the following report—If the committee understand the scope of duties assigned to them they are to enquire and report what proceedings have been had upon the subject referred to them and whether they are regular, and secondly what steps are yet necessary to be taken—1st on investigation the committee find that on the 10th day of January, 1843, at a meeting of the council,
83 Samuel B. Scott, Isaac S. Smith and Samuel Allen, all disinterested freeholders of said city were appointed a committee to assess the expense of grading Water street from Monroe to Lagrange street and Summit from Monroe to Elm street and all cross streets running from Summit street to the Maumee River and also Perry street upon the lands and grounds bounding and abutting on said streets and near thereto, and to estimate the cost of said improvement and to assess the damages sustained by any one by reason of such improvement. That at a meeting of the city council held at the council room on the 10th day of January, A. D. 1843, the said council ordered a notice to be given in the Toledo Blade, a newspaper published in said city, for six consecutive weeks of such improvements in order that any one damaged by such improvement might file his claim in writing in the office of the city clerk within ten days after the expiration of said six weeks' notice. That in pursuance of such order such notice was regularly published in said Toledo Blade for six consecutive weeks. That in conformity with such notice Luke Draper on the 8th day of March A. D. 1843, filed in the office of the city clerk a claim in writing for damages to be sustained by reason of such improvement. That the committee after the expiration of ten days allowed by the city charter to file claims for damages, and within twenty days after the expiration of said period to ten days towit: on the 25th day of March A. D. 1843 (the said committee having been duly sworn according to law before entering upon their duties in the premises) made their return to the office of the Treasurer of said city setting forth the costs of such improvements including all damages by them awarded to all claimants together with the names of such claimants and the ground of their claims with the amount if any awarded to them set opposite their respective names, and also a brief description of the lands and grounds upon which they assessed the expense of such improvement with the names of the — or persons liable to pay such assessment respectively annexed and amount thereof set opposite their respective names and where the name of the person owning or liable to pay such assessment was not known, such fact was stated in such

return by writing, unknown owners, in place of the name. In all which particulars the committee beg leave to state, there appears to have been a strict and careful compliance with the provisions of the act of incorporation of said city *and* pursuit of the powers conferred thereby. This committee have had their attention
84 called to the survey and plat of said city and they have been thus led to enquire whether these have been legal. On this point they beg leave to report that it appears that the original surveys of said city appear to have been by two divisions, one designated as the Port Lawrence and the other as the Vistula Division of said city. That according to the survey of said Port Lawrence Division, the street now known as Summit street where the same runs through said Port Lawrence Division was known as Erie street, and that Water street terminated in Adams street, that according to the original survey of said Vistula Division, Water street was not surveyed or opened. These surveys were made whilst said towns were subject to the jurisdiction of the then territory, now state of Michigan, but your committee are only able to report their opinion founded upon the information of others that such surveys and the plats thereof were made and recorded pursuant to the laws of said territory of Michigan in force at the time the same were made. The committee further report that after the transfer of jurisdiction of the State of Ohio, other said towns both of the said divisions were united under one name and incorporated as the said city of Toledo; and that after such transfer of jurisdiction, to-wit, some time in the month of September A. D. 1837, the proprietors of both divisions and the owners of lots in said divisions caused a new survey thereof to be made by Robert Gower surveyor, by which among other things so much of said Summit street as runs through said Port Lawrence Division and as was called Erie street was changed to Summit street and Water street was continued through said Vistula Division to Lagrange street; that in the survey of said Water street or the extension thereof as aforesaid lines were run, monuments and boundaries established; that a map of such new survey and alteration was made, signed and acknowledged by the proprietors and owners of lands in all respects according to law, and that on the 24th day of October 1837 said map and plat were duly deposited in the office of the recorder of Lucas county, for record, but that it appears that the said map and plat have not been copied into the recorder's books. The committee further report that said Water street appears to have been treated and regarded not only by the public but by the owners of lands and lots bounding thereon as having been dedicated to the public and as being a public and valid street. The committee have further to report that pursuant to a resolution of the
85 city council passed on the 8th day of April, 1839, William Martin then being the official surveyor of said city surveyed, described and permanently marked the boundaries, public streets, roads, lanes, alleys and highways and public grounds then existing in said city including said Water street and returned to the city clerk's office a map and plat thereof now remaining of record therein and that the said map or plat corresponds in most respects with the said second survey, map or plat of said city made for the proprie-

tors by Robert Gower. And the committee further report that the said grade committee appear to have pursued and been governed by said maps, and to have pursued said surveys, and it does not appear but what said grade committee entertined all applications for damages by reason of the opening of said street as well as said improvement. From this state of facts the committee deduced the following conclusions. 1st that power is given in the 28th section of the act to incorporate said city as well *as* to lay out and open and alter as to improve streets, that Martin's survey was a legal and proper mode to establish and identify a street already set apart by the owners of the soil. 2d. It may be contended too and with no small share of reason that the act of grading involves the act *or* opening it, the one being necessary to the other act: and as the grade committee appeared to have entertained all applications for damages to be sustained by reason of the opening as well as the improvement of the street no injustice can be done. 3d. But, however, this may be your committee deem it clear that Water street was legally established by the proprietors upon depositing their map in the recorder's office for record that by these acts that street is to be regarded as a public street which the proprietors can not reclaim, the use of which is vested in the public, and in respect to which said city authorities have complete jurisdiction for all public and municipal purposes. Your committee therefore see in the proceedings nothing but what is regular and legal and recommend that an order be made by the council to make and complete said grading. 4th. The committee recommend that an ordinance be passed directing that said improvement be made authorizing the owners of lands and grounds charged with a tax to commute the same by work, labor and materials; authorizing the street commissioner to contract for said improvements and to pledge the faith of the city for payment out of the funds to be created by the special tax. The committee further recommend
86 that the clerk *to* procure a proper book and therein record all surveys, maps and plats of existing streets, lanes, alleys, market places, squares, wharfs; slips and public grounds now existing or hereafter laid out or altered and this and all other reports relating to the establishment of grades and special improvements and all other proceedings relating to any of the subjects aforesaid to be recorded, which said book of record shall remain in the city clerk's office for the use of the city and all other persons interested therein.

The committee herewith report a bill embodying all objects of this report. All of which is respectfully submitted.

May 15, 1843.

O. B. OLMSTED,
JOHN P. FREEMAN,
PETER PALMER.

34.

"EXHIBIT T."

Copy of tax duplicate of the city of Toledo, Ohio, for the year 1843, including the three following pages as follows:

Tax Duplicate of 1843.

The City of Toledo, Duplicate of Special Taxes Assessed for Grading Certain Streets as Provided for by Ordinance Passed June 26, 1843.

Names of owners.	No. of lot.	Division.	Amt. of tax. D. C. M.	
Bissell Edward	18	Vistula	66.57. 0	Delinquent.
	19		66.57. 0	Delinquent.
	30		99.86. 0	Delinquent.
	31		76.56. 0	Delinquent.
	32		76.56. 0	Delinquent.
	33		76.56. 0	Delinquent.
	34		76.56. 0	Delinquent.

The above from page- 129 and 130.

Bissell Sidney	1000	Vistula	199.27. 0	Delinquent.
	1001		549.20. 0	Delinquent.
	1008		166.42. 0	Delinquent.
	1009		199.70. 0	Delinquent.

This from page- 133 and 134.

Unknown	1008¼	Vistula	16.60. 0	Delinquent.

This from page- 143 and 144.

Other lots and descriptions of lands with the amounts of taxes and assessments charged against the same duly appear on said duplicate, but are omitted from this copy by consent of all parties.

87

The general taxes for the year 1843 were duly separately charged on the said duplicate on other pages and in other columns and were paid.

"EXHIBIT T—Continued."

City of Toledo Tax Duplicate for 1843.

Duplicate of Special Tax Assessed for Grading Certain Streets as Provided for by Ordinance Passed June 26, 1843.

THE STATE OF OHIO,
Lucas County, ss:

THE CITY OF TOLEDO,
MONDAY, *July* 3, 1843.

To the Collector of said City, Greeting:

You are hereby commanded to collect from the several persons named in this Tax Duplicate the amount of taxes specified to be paid by each individual therein named and the several sums set opposite to their names respectively and to proceed in enforcing the collection of said taxes in the same manner by distress and sale of personal property, and advertisement and sale of real estate as is prescribed by the several acts regulating the mode of taxation in said State as far as the same shall not conflict with your duty relative to the collection of said taxes as regulated and prescribed by the Charter, ordinances and resolutions of said City.

Given under our hands and the seal of said City on the day and year first above written.

JAMES MYERS,
Mayor of City of Toledo.

Attest:

[Seal of the City of Toledo, Incorporated 1837.]

EDSON ALLEN, *Clerk.*

We and each of us certify that on the first day of July, 1843, we delivered to the collector of said City of Toledo, this Duplicate of General and Special Taxes for said City for 1843.

EDSON ALLEN, *Clerk.*
JAS. M. COMSTOCK, *Treas.*

Unnumbered page after page 144.

"EXHIBIT T—Continued.

City of Toledo Tax Duplicate for 1843.

Duplicate of Special Taxes Assessed for Grading Certain Streets as Provided for — an Ordinance Passed June 26, 1843.

THE STATE OF OHIO,
Lucas County, ss:

TREASURER'S OFFICE,
CITY OF TOLEDO, *July* 1, 1843.

I, James M. Comstock, Treasurer of said City of Toledo, do hereby certify, that the foregoing list of town lots with ss. the names of the owners thereof, together with the amount of tax thereon assessed and set opposite to the said lots and names respectively as entered upon pages 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143 and 144 of this book is a true and correct duplicate of an assessment made by a committee appointed by the Council of said City, (three disinterested freeholders of said City) on the tenth day of January, 1843, to estimate the cost of constructing a bulk head in Water Street and Grading and filling in certain streets as directed by resolution adopted by said Council on the said 10th day of January, 1843, and to assess a Special Tax, to defray the expense of the same. Return of which said assessment estimate and Special Tax was duly made by said committee and filed in the said office of the City Treasurer on the 25th day of March, 1843.

In testimony whereof, I have hereunto set my hand the day and year, *the* first above written.

JAMES M. COMSTOCK, *Treas.*

Unnumbered page after page 144.

25.

"EXHIBIT U."

Tax Record, 1843, "D" 129, 133, 139, 143.

THE CITY OF TOLEDO:

Record of Special Tax Assessed for Grading Certain Streets, as Provided for by an Ordinance, Passed June 26, 1843.

Names of owners.	No. of lots.	Division.	Amt. of Tax. D. C. M.
Edward Bissell.....	18	Vistula	66.57
	19		66.57
	30		99.86
	31		76.56
	32		76.56
	33		76.56
	34		76.56
The above is on page 129.			
Sidney Billell.....	1000	Vistula	499.27
	1001		549.20
	1008		166.42
	1009		199.70
This is on page 133.			
State of Ohio.....	20	Vistula	66.57
This is on page 139.			
Unknown	1008½	Vistula	46.50
This is on page 143.			

89 **36.**

"EXHIBIT V."

Copy of tax duplicate of the City of Toledo, Ohio, for the year 1844, including the three following pages as follows:

City of Toledo Tax Duplicate for 1844.

Duplicate of Special Grade Tax Assessed for Grading Certain Streets as Provided for by Ordinance Passed June 26, 1843.

Names of Owners.	Nos. of lot.	In what Division		Grade Tax. Delinquent D. C. M.	Abated	Sale enjoined.
Henry Anderson.	18	Vistula	66.57,	87.20.6,	20.63.6	"
	19		66.57,	87.20.6,	20.63.6	"
	20		66.57,	87.20.6,	20.63.6	"
	31		76.56,	100.29.3,	23.73.3	"
	32		76.56,	100.29.3,	23.73.3	"
	33		76.56,	100.29.3,	23.73.3	"
	34		76.56,	100.29.2,	23.73.3	"
	1000		499.27,	654.04.3,	154.77.3	"
	1001		549.20,	719.45.2,	170.25.2	"
	1008		166.42,	218.01.0,	51.59	"
	1009		199.70,	261.60.7,	61.90.7	"

The above from page 66.

Unknown Owners	30	Vistula	99.86,	130.81.6,	30.95.6	"

This from page 71.

" " 1008¼ Vistula 46.60, 61.04.6, 14.44.6 "

Being all that piece of land or lot lying between lot 20 Vistula Division and lot 1008 Addition to Vistula being 21 feet front on Lynn St. and running back or easterly 82 8-10 feet from Lynn Street.

This is from page 72.

Other lots and descriptions of lands with the amounts of taxes and assessments charged against the same duly appear on said duplicate, but are omitted from this copy by consent of all parties.

The general taxes for the year 1844 were duly separately charged on the said duplicate on other pages and in other columns and were paid.

177

38.

"EXHIBST V—Continued."

THE STATE OF OHIO,
Lucas County, ss:

CITY OF TOLEDO,
MONDAY, *July 1st*, 1844.

To the Collector of said City—Greeting:

You are hereby commanded to collect from the several per-
90 sons named in this tax duplicate the amount of taxes specified to be paid by each individual therein named, and the several sums set opposite to their names respectively and to proceed in enforcing the collection of said taxes in the same manner by distress and sale of personal property, and advertisement and sale of real estate, as is prescribed by the several acts regulating the mode of taxation in said State and as far as the same shall not conflict with your duty relative to the collection of said taxes as regulated and prescribed by the Charter, ordinances and resolution of said City.

Given under our hands and the seal of said City on the day and year first above written.

GEO. B. WAY,
Mayor of City of Toledo.

Attest:
SAML. B. SCOTT,
City Clerk.

We and each of us do hereby certify that on Monday the first day of July, A. D. 1844, we delivered to the collector of said City of Toledo, this duplicate of general and special taxes for said City for the year 1844.

SAML. B. SCOTT,
City Clerk.
J. KAUFMAN, *Treas.*

The above from page 78.

37.

"EXHIBIT V—Continued."

THE STATE OF OHIO,
Lucas County, ss:

TREASURER'S OFFICE, CITY OF TOLEDO,
MONDAY, *July 1st*, 1844.

I, John Kaufman, Treasurer of said City of Toledo, do hereby certify that the foregoing list of town lots and parts of lots, with the names of the owners thereof together with the amount of tax thereon assessed set opposite to these said lots and names respectively, as entered upon pages 74, 75 and 76 of this (duplicate) book.

is a true and correct duplicate of the assessment made by the Committee appointed by the Council of said City of Toledo, to estimate the cost of constructing a bulk head in Water Street from the easterly line of Adams Street to its intersection with Monroe Street, and grading and filling in certain streets and parts of streets, as directed by resolution of said City Council, adopted the 16th day of November, A. D. 1843 and to assess a special tax to defray the expenses thereof return of which said assessment roll was duly made by said committee and filed in said office of the City Treasurer on the 5th day of February A. D. 1844.

In testimony whereof, I have hereunto set my hand the day and year first above written.

JOHN KAUFMAN, *Treas.*

This from page 77.

91 39.

"EXHIBIT W."

From Tax Record 1843.

Delinquent Town Lots for Special Grade Tax, Returned Monday January 1, 1844.

Names of Owners.	No. of Lots.	Division.	Amt. of tax. D. C. M.	Why not Collected.
Bissell	18	Vistula	66.57. 0.	Payment refused.
Edward	19		66.57. 0.	Payment refused.
	30		99.86. 0.	Payment refused.
	31		76.56. 0.	Payment refused.
	32		76.56. 0.	Payment refused.
	33		76.56. 0.	Payment refused.
	34		76.56. 0.	Payment refused.

This is from page 227.

Bissell	1000	Vistula	499.27. 0.	Payment refused.
Sidney	1001		549.20. 0.	Payment refused.
	1008		166.42. 0.	Payment refused.
	1009		119.70. 0.	Payment refused.

This is from page 231.

State of Ohio.	20	Vistula	66.57. 0.	Payment refused.

This is from page 233.

Unknown Owners.	1008½	Vistula	46.60. 0.	Payment refused.

This is from page 235.

40.

"EXHIBIT X."

Copy of tax duplicate of the city of Toledo, Ohio, for the year 1845, including the two following pages as follows:

THE STATE OF OHIO,
Lucas County, ss:

CITY OF TOLEDO, MONDAY, *July* 7, 1845.

To the Collector of Said City, Greeting:

You are hereby commanded to collect from the several persons named in this tax duplicate the amount of taxes specified to be paid by each individual named for general and Special purposes, and the several sums set opposite to their names respectively, and to proceed in enforcing the collection of said taxes in the same manner by distress and sale of personal property and advertisement and sale of real estate as is prescribed by the several acts regulating the mode of taxation in said State, as far as the same shall not conflict with your duty relative to the collection of said taxes
92 as regulated and prescribed by the Charter, ordinances and resolutions of said city.

Given under our hands and the seal of said city on the day and year first above written.

Attest:
SAM'L B. SCOTT,
City Clerk.

[Seal of the City of Toledo. Incorporated 1837.]

RICHARD MOTT, *Mayor.*

We and each of us do hereby certify that on Monday the 7th day of July, A. D. 1845 we delivered to the collector of said city of Toledo the duplicate of general and Special taxes for said city for the year 1845.

SAM'L B. SCOTT,
City Clerk.
CHAS. A. CRANE, *Treas.*

The above is from page 33.

Other lots and descriptions of lands with the amounts of taxes and assesments charged against the same duly appear on said duplicate, but are omitted from this copy by consent of all parties.

The general taxes for the year 1845 were duly separately charged on the said duplicate on other pages and in other columns and were paid.

41.

"EXHIBIT X—Continued."

City of Toledo Tax Duplicate for 1845.

Special Tax for Grading Certain Streets as Provided for by Ordinance Passed June 26, 1843.

Nos. lots.	Names of Owners.	Division.	Amt. of tax. Delinquent. D. C. M.
18	Anderson Henry	Vistula	66.57
			66.57
19			66.57
20			76.56
31			76.56
32			76.56
33			76.56
34			499.27
1000			549.20
1001			166.42
1008			199.70
1009			

The above is from page 14.

30	Unknown Owners	Vistula	99.86

This is from page 18.

1008½	Unknown Owners		46.60

Being all that piece of land or lot lying between lot
93 20, Vistula Division and lot 1008 addition to Vistula being 21 feet front on Lynn street and running Easterly 82½ feet from Lynn street.

This is from page 20.

42.

"EXHIBIT Y."

In Book designated tax record "D", 1843, 1844, 1845, Pages 13, 16 & 17. City of Toledo, tax record for 1845.

Special tax assessed for grading certain streets as provided for by ordinance passed June 26, 1843.

Names of Owners.	Nos. Lots.		Amt tax. D. C. M.	Debt. enjoined.
Anderson Henry	18		66.57	
	19		66.57	
	20		66.57	
	31		76.56	
	32		76.56	
	33		76.56	
	34		76.56	
	1000		499.27	
	1001		549.20	
	1008		166.42	
	1009		199.70	
Unknown Owners	30	Vistula	99.86	

The above is from page 13.

This is from page 16.

Unknown Owners	1008½	Vistula	46.60	

Being all (that piece of land or) lot lying between Lot 20 Vistula Division & lot 1008 Addition to Vistula, being 21 feet from on Lynn Street & running Easterly 82½ feet from Lynn Street.

This is from page 17.

43.

"Exhibit Y—Continued."

Tax Record "D," 1843, 1844, 1845, pages 47 and following.

Special Tax Assessed for grading certain streets provided for by Ordinance passed, June 26, 1843.

Vistula Grade Taxes assessed for grading certain streets under ordinance June 26, 1843.

Names of Owners	Nos. Lots.	Division	Amt. of tax $. C. M.	*Collection enjoined.*
Anderson Henry	18	Vistula	66.57 0.	Collection enjoined.
	19		66.57	Collection enjoined.
	20		66.57	Collection enjoined.
94	31		76.56	Collection enjoined.
	32		76.56	Collection enjoined.
	33		76.56	Collection enjoined.
	34		76.56	Collection enjoined.
	1000		499.27	Collection enjoined.
	1001		549.20	Collection enjoined.
	1008		166.42	Collection enjoined.
	1009		199.70	Collection enjoined.

The above is from page 47.

Unknown Owners	30	Vistula	99.86	Collection enjoined.
	1008½		46.60	Collection enjoined.

Being all that (piece of land or) lot lying between Lot 20 Vistula Division and lot 1908 Addition to Vistula being 21 feet from on Lynn street and running Easterly 82½ from Lynn street.

The last two from page 50.

"Exhibit Y—Continued."

City of Toledo, *Monday Jan'y* 5, 1846.

The State of Ohio,
Lucas County, ss:

I hereby certify that the list of lands and town lots and parts thereof as entered and recorded on the last before numbered pages of this book, to-wit: on pages 47, 48, 49, 50, 51, 52, 53, 54, and 55 is a true and correct list and record of lands and town lots on which taxes charged by the city of Toledo, county and State aforesaid for city and special purposes, for the years A. D. 1843, 1844 and 1845 were due and unpaid on the first Monday in January 1846 as respec-

tively set opposite to the several tracts of lands, town lots and parts thereof in the list and record contained. That the said land and town lots are delinquent for the amount set opposite thereto, and that no personal property could be found to pay the taxes charged as aforesaid on the lots on which the collection of taxes were not enjoined.

I also hereby certify that the collection of taxes on the list of lands entered on page 47 aforesaid and the list of lots and parts thereof entered on pages 47, 48, 49, 50 and part of 51 aforesaid charged with the amount of tax set opposite thereto respectively, being a special assessment for grading certain streets as provided for by an ordinance passed June 26 A. D. 1843 and the list of lots and parts thereof recorded on pages 51, 52, 53 and 54 on which a tax is assessed for grading certain streets provided for by an ordinance passed February 13, A. D. 1844 was enjoined on the 28th day of December, 1844.

95 I also hereby certify that all and each of the forementioned lands, lots and parts thereof charged with a special tax for city purposes as recorded on pages 47, 48, 49, 50, 51, 52, 53, 54 and 55 1st mentioned were returned by me on Monday the 5th day of January A. D. 1846 (being the first Monday in January aforesaid) to the clerk of the city of Toledo at said clerk's office and that the said lots and taxes are delinquent and unpaid and that the reasons set opposite to each tract or parcel of land and each town lot or part thereof of the why the same are unpaid or delinquent. And that the same are unpaid and delinquent for the amount set opposite thereto and that the description thereof together with the taxes thereon as in said list or record mentioned are taken from the duplicate of the Tax Record of said city of Toledo for the year A. D. 1845, which was placed in my hands for collection on the first Monday of July 1845 and that all of the several matters and things in the said list and record contained are substantially true and correct as I verily believe.

I, Oliver W. Whitmore, collector, of said city of Toledo, being duly affirmed do depose and say that the above and foregoing is a true list and record of delinquent, unpaid lands and town lots in said city as made and returned by me on the first Monday in January, A. D. 1846 to the clerk of said city and all statements contained therein are true as I verily believe.

O. W. WHITMORE, *Collector.*

The above return and affidavit subscribed and sworn to before me by the said O. W. Whitmore this 3d day of February, A. D. 1846.

RICHD. MOTT, *Mayor.*

44.

"EXHIBIT Z."

Copy of tax duplicate of the city of Toledo, Ohio, for the year 1846, including the two following pages, as follows:

City of Toledo Tax Duplicate 1846.

Special tax assessed for Grading certain street provided for by ordinance passed June 26, 1843.

Owners' Names	No. of lot.		Vistula Grade Tax Dolls. Cts. M.	
Anderson Henry	18	Vistula	66.57	Delinquent.
	19		66.57	Delinquent.
	20		66.57	Delinquent.
	31		76.56	Delinquent.
	32		76.56	Delinquent.
96	33		76.56	Delinquent.
	34		76.56	Delinquent.
	1000		499.27	Delinquent.
	1001		549.20	Delinquent.
	1008		166.42	Delinquent.
	1009		199.70	Delinquent.

The above from page 86.

Unknown Owners	30	Vistula	99.86	Delinquent.

This from page 90.

Unknown Owners	1008½	Vistula	46.60	Delinquent.

Being all that piece of land or lot lying between lot 20 Vistula Division and lot 1008 Addition to Vistula being 21 feet front on Lynn street and running Easterly 82½ feet from Lynn street.

The above from page 91.

Other lots and descriptions of lands with the amounts of taxes and assessments charged against the same duly appear on said duplicate, but are omitted from this copy by consent of all parties.

The general taxes for the year 1846 were duly separately charged on the said duplicate on other pages and in other columns and were paid.

"EXHIBIT Z.—Continued."

THE STATE OF OHIO,
Lucas County, ss:

CITY OF TOLEDO, *October* 31*st*, 1846.

To the Treasurer of the City of Toledo, Greeting:

You are hereby commanded to collect from the several persons named in this tax duplicate (for 1846) the amount of taxes specified to be paid by each individual therein named for general and special purposes, the several sums set opposite to their names, respectively and to proceed to enforcing the collection of said taxes in case the same are not paid; by distress and sale of personal property and advertisement and sale of real estate as prescribed and directed by the several acts regulating the mode of collecting said taxes in the Charter of said City of Toledo; and as regulated and prescribed by the ordinance and resolution of said City Council.

Given under our hands and seal of said City on the day and year first above written.

[Seal of the City of Toledo, Incorporated in 1837.]

RICHD. MOTT, *Mayor.*

Attest:

E. B. BROWN, *Clerk.*

97

19.

"EXHIBIT AA."

Tax Record of 1846.

CITY OF TOLEDO, *October* 31*st*, 1846.

STATE OF OHIO,
Lucas County, ss:

To the Treasurer of the City of Toledo, Greeting:

You are hereby commanded to collect from the several persons named in this tax duplicate ("Record") for the year 1846 the amount of tax specified to be paid by each individual therein named for general and special purposes, the several sums set opposite to their names respectively and to proceed in enforcing the collection of said taxes in case the same are not paid, by distress and sale of personal property and advertisement and sale of real estate as prescribed and directed by the several acts regulating the mode of collecting said taxes in the Charter of said City of Toledo, and as regulated and prescribed by the ordinances and resolutions of said City Council.

Given under our hands and seal of said City on the day and year first above written.

E. B. BROWN, *City Clerk.*

I do hereby certify that on the 31st day of October 1846 I delivered to the Treasurer of said City of Toledo (Charles A. Crane) this duplicate of special and general taxes for said City for the year 1846.

E. B. BROWN, *City Clerk.*

Tax Record 1846-47, page 1½.

20.

"Exhibit AA.—Continued."

City of Toledo Tax Record 1846—Continued.

Special tax assessed for grading certain streets provided for by ordinance passed June 26th, 1843.

Owner's Names.	No. of Lot.	Division.	Amt. tax. Doll's. Cts. M. Vistula Grade.	Collection enjoined.
Anderson Henry	18	Vistula	66.57	
	19		66.57	
	20		66.57	
	31		76.56	
	32		76.56	
	33		76.56	
	34		76.56	
	1000		499.27	
	1001		549.20	
	1008		166.42	
	1009		199.70	

The above is from page 86.

98

Unknown Owners	30		99.86	

This from page 90.

Unknown Owners	1008½		46.60	

Being all that piece of land or lot lying between lot 20 Vistula Division and Lot 1008 same division, being 21 feet from on Lynn Street and running Easterly 82½ feet from Lynn Street.

The above from page 91.

Tax Rec. 1846-1847, pp. 99½.

21.

"EXHIBIT A. A.—Continued."

Tax Record 1846, Continued.

Treasurer's Office, City of Toledo,
Defendant 28, 1846.

STATE OF OHIO,
Lucas County, ss:

I, Chas. A. Crane, treasurer of the city of Toledo, do hereby certify that the following notice was published in the "Toledo Blade," commencing on the 2d day of November, A. D., 1846 (being the first Monday in said month) and continuing to be published in said Toledo Blade once in each week until this day and that the said Toledo Blade was the paper designated by the council for the publication of said notice.

"Notice is hereby given that the duplicate of taxes of the city of Toledo for city purposes and for special improvements, grades, sidewalks, etc., has been placed in my hands for collection and if the taxes thereon assessed shall not be paid prior to the last Monday in December, 1846, then the several tracts of lands or lots or parts of lots described in said duplicate, and upon which taxes shall not then have been paid, or so much thereof as may be necessary to pay the taxes so charged thereon, will then be sold at public auction, at the council room in said city and which sale will commence at 10 o'clock A. M. on said last Monday in December, 1846 and be continued from day to day until the same are disposed of."

CHAS. A. CRANE,
Treasurer of the City of Toledo.

Monday, November 2, 1846.

In witness whereof, I have hereunto set my hand and affixed the corporate seal of said city on the day and year first above written.

[Seal of the City of Toledo, Incorporated 1837.]

CHAS. A. CRANE, *Treasurer.*

The above pg. 99½.

22.

99 "EXHIBIT A. A.—Continued."

City of Toledo Tax Record, 1846, 1847, Continued.

Town lots returned by the treasurer on Monday the 1st day of February 1847. Special Tax assessed for grading certain streets provided for by ordinance passed June 26, 1843.

Owners Names.	No. of Lot.	Division.	Vistula Grade Tax. Doll's, Cts., M.	
Anderson Henry	18	Vistula	66.57	C'tion enjoined.
	19		66.57	C'tion enjoined.
	20		66.57	C'tion enjoined.
	31		76.56	C'tion enjoined.
	32		76.56	C'tion enjoined.
	33		76.56	C'tion enjoined.
	34		76.56	C'tion enjoined.
	1000		499.27	C'tion enjoined.
	1001		549.20	C'tion enjoined.
	1008		166.42	C'tion enjoined.
	1009		199.70	C'tion enjoined.

The above from page 123.

Unknown owners.	30	Vistula	99.86	C'tion enjoined.

This is from page 127.

Unknown owners.	1008½		16.60	C'tion enjoined.

Being all that piece of land or lot lying between lot 20 Vistula Division and lot 1008 addition to Vistula being 21 feet front on Lynn street and running Easterly 82½ feet from Lynn street.

The above from page 128.

Tax Record 1846-1847, page 129.

22.

"EXHIBIT A. A.—Continued."

Tax Record 1846, Continued.

Clerk's Office, City of Toledo.

JANUARY 18, 1847.

STATE OF OHIO,
Lucas County, ss:

I hereby certify that the list of lands and town lots, and parts thereof as recorded on pages numbered 123, 124, 125, 126, 127,

and 128 in this book on which was charged a tax or special assessment for grading certain streets as provided for by an ordinance passed on the 26 day of June, A. D. 1843, is a true and correct copy of that returned by the treasurer of said city, Chas. A. Crane, on Monday the 18th day of January, A. D., 1847, and the reason assigned for the return of said lots assessed as aforesaid was
100 the sale and collection of the taxes charged thereon, having been enjoined on the 28th day of December, 1844. And that all the said matters and things in the said list or record mentioned are true, and that the lots and parts thereof are delinquent for the amount set opposite thereto, and that the description thereof together with the taxes thereon severally assessed, and now remaining due and unpaid, as in the said aforementioned pages recorded are taken from the duplicate of the tax record of said city for the year 1846.

In testimony whereof I have hereto set my hand and affixed the corporate seal of said city.

[Seal of the City of Toledo, Incorporated 1837.]

CHAS. I. SCOTT,
City Clerk.

"EXHIBIT B. B."

City of Toledo Tax Duplicate, 1847.

Special tax assessed for grading certain streets provided for by ordinance passed June 26, 1843.

Owners Names.	No. of Lot.	Division.	Vistula Grade Tax. Doll's, Cts., M.	
Anderson Henry	18	Vistula	66.57. 0	C. M. Dorr, Paid.
	19		66.57. 0	C. M. Dorr, Paid.
	(20		66.57. 0	C. M. Dorr, Paid.
	31		76.56. 0	C. M. Dorr, Paid.
	32		76.57. 0	C. M. Dorr, Paid.
	33		76.56. 0	C. M. Dorr, Paid.
	34		76.56. 0	C. M. Dorr, Paid.
	1000		499.27. 0	C. M. Dorr, Paid.
	1001		549.20. 0	C. M. Dorr, Paid.
	1008		166.42. 0	C. M. Dorr, Paid.
	1009		199.70. 0	C. M. Dorr, Paid.
The above from page 88.				
Unknown owners.	30	Vistula	99.86. 0	C. W. Hill, Paid.
This from page 92.				
Unknown owners.	1008½	Vistula	46.60. 0	T. H. Hough, Pd.

Being all that piece of land or lot lying between lot 20 Vistula Division and lot 1008 addition to Vistula being 21 feet front on Lynn street and running Easterly 82½ feet from Lynn street.

This last from page 93.

The owners names, the descriptions of the several lots or parcels of land and the amounts of the taxes charged against each lot or parcel of land on the foregoing duplicate are all written in ink in the same hand writing, but the two right hand columns on said duplicate are in lead pencil and another hand writing.

101 45.

"EXHIBIT B. B.—Continued."

Copy of tax duplicate of the city of Toledo, Ohio, for the year 1847, including the two following pages, as follows:

City of Toledo Tax Duplicate 1847, Continued.

CITY OF TOLEDO, *November* 1st, 1847.

THE STATE OF OHIO,
Lucas County, ss:

To the treasurer of the city of Toledo, Greeting: Your are hereby commanded to collect from the several persons named in the tax duplicate for the year 1847, the amount of taxes specified to be paid by each individual therein named, for general and special purposes, the several sums set opposite to their names respectively and to proceed in enforcing the collection of said taxes in case the same are not paid, by distress and sale of personal property and advertisement and sale of real estate as prescribed and directed by the several acts regulating the mode of collecting said taxes in the Charter of said city of Toledo, and as regulated and prescribed by the ordinances and resolutions of said City Council.

Given under our hands and corporate seal of said city the day and year above written.

[Seal of the City of Toledo, Incorporated 1837.]

CHARLES I. SCOTT,
City Clerk.

The above is in the beginning of this volume at an unnumbered page.

Other lots and descriptions of lands with the amounts of taxes and assessments charged against the same duly appear on said duplicate but are omitted from this copy by consent of all parties.

The general taxes for the year 1847 were duly separately charged on the said duplicate on other pages and in other columns and were paid.

EMERY D. POTTER, *Mayor.*

23.

"EXHIBIT C. C."

Tax Record of 1847.

CLERK'S OFFICE,
CITY OF TOLEDO, *November* 1st, 1847.

STATE OF OHIO,
Lucas County, ss:

To the treasurer of the city of Toledo, Greeting: You are hereby commanded to collect from the several persons named in this tax duplicate (Record) for the year 1847, the amount of taxes specified to be paid by each individual therein named for general and special purposes, the several sums set opposite to their names "respect*fully*," and to proceed in enforcing the collection of said taxes, in
102 case the same are not paid, by distress and sale of personal property and advertisement and sale of real estate as prescribed and directed by the several acts regulating the mode of collecting said taxes in the Charter of said city of Toledo and as regulated and prescribed by the Ordinances and Resolutions of said City Council.

Given under our hands and corporate seal of said city the day and year as above written.

CHAS. I. SCOTT,
City Clerk.

The above is on page 137½.

24.

"EXHIBIT C. C.—Continued."

City of Toledo Tax Record. 1847. Continued.

Special tax assessed for grading certain streets provided for by ordinance passed June 26, 1843.

Owners' names.	No. of Lots.	Division.	Vistula Grade Tax. Doll's, Cts., M.
Henry Anderson.....	18	Vistula	66.57.0
	19		66.57.0
	20		66.57.0
	31		76.56.0
	32		76.56.0
	33		76.56.0
	34		76.56.0
	1000		499.27.0
	1001		549.20.0
	1008		166.42.0
	1009		199.70.0
The above is from page 225.			
Unknown owners.....	30	Vistula	99.86.0
This is from page 229.			
Unknown owners.....	1008½	Vistula	46.60.0

Being all that piece of land or lot lying between lot 20 Vistula Division and lot 1008 addition to Vistula, being 21 feet front on Lynn street, running Easterly 82½ feet from Lynn street.
This is from page 230.

Tax Record 1846-1847, Page 264.

25.

"Exhibit C. C.—Continued."

Tax Record of 1847, Continued.

Treasurer's Office,
City of Toledo, *December* 27, 1847.

State of Ohio,
Lucas County, ss:

I, Charles S. Whitney, treasurer of the city of Toledo,
103 do hereby certify that the following notice was published in the Toledo Blade, commencing on the first day of November A. D., 1847, being the first Monday in said month, and continuing to be published in the said Toledo Blade once in each week until this day, and that the said Toledo Blade was the paper "designation" for that purpose by the Council of the city aforesaid.

"Notice is hereby given that the duplicate of taxes of the city of Toledo for city purpose and for special improvements, grades, bridges, sidewalks, etc., has been placed in my hands for collection, and if the taxes thereon assessed shall not be paid prior to the last Monday in December, 1847, then the several tracts of land and lots or parts of lots described in said duplicate, "and upon taxes shall not then have been paid" or so much thereof as may be necessary to pay the taxes so charged thereon, will then be sold at public auction at the Council Room in said city, and which sale shall commence at 10 o'clock A. M. on said last Monday in December, 1847, and be continued from day to day until the same are disposed of.

CHARLES S. WHITNEY,
Treasurer of the City of Toledo.

Treasurer's Office, City of Toledo,
Monday, *Nov.* 1, 1847.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of the said city, the day and year above written.

[Corporate Seal of the City of Toledo, Incorporated 1837.]

C. S. WHITNEY,
Treasurer of the City of Toledo.

Tax Record 1847, Page 264.

26.

"EXHIBIT D D."

Delinquent List Copied, Vistula Special Grade Tax.

City of Toledo Tax Record, October 1, 1847.

THE STATE OF OHIO,
Lucas Co., ss:

A list of town lots and parts of town lots returned unpaid and delinquent by the treasurer of said city for the year 1846, special tax assessed for grading streets provided for by ordinance passed June 26, 1843.

Owners' names.	No. of lot.	Division.	Vistula grade tax. Dolls., cts., M.
Anderson Henry	18	Vistula	66.57
	19		66.57
	20		66.57
	31		76.56
	32		76.56
104	33		76.56
	34		76.56

Above from page 265.

Anderson Henry	1000	Vistula	499.27
	1001		549.20
	1008		166.42
	1009		199.70

This from page 266.

Unknown owners.	30	Vistula	99.86

From page 269.

Unknown owners.	1008½	Vistula	46.60

Being all that piece of land or lot lying between lot 20 Vistula Division and lot 1008 addition to Vistula being 21 feet on Lynn street running Easterly 82½ feet from Lynn street.

The above from page 270.

Tax Record. Page 275, 1847.

26.

"EXHIBIT D D—Continued."

I hereby certify that the town lots and parts of town lots in the foregoing list described, are delinquent and unpaid, as set forth for the amount of taxes charged thereon, respectively, for special improvements for the years as therein named.

"Notice is hereby given that in case said taxes be not *not* paid to the treasurer of the city of Toledo, prior to the last Monday in December next being the 27th day thereof, the whole of the several parcels of land and town lots and parts of town lots in said list contained or so much thereof as will pay the taxes respectively charged thereon will be sold at and after the hour of ten o'clock in the forenoon on the last Monday in December aforesaid, by the treasurer of said city at the Council Chamber therein, according to the Charter of said City and the Ordinance and Resolutions thereof.

In Witness Whereof I have hereunto set my hand and affixed the corporate seal of said city, the day and year first above written.

CHAS. I. SCOTT, [L. S.]
City Clerk.

STATE OF OHIO,
Lucas County, ss:

CLERK'S OFFICE, CITY OF TOLEDO, *December* 4, 1847.

I, Chas. I. Scott, clerk of said city of Toledo, do hereby certify that the foregoing list of town lots and parts of town lots severally delinquent for the special taxes assessed for grading certain
105 streets, as provided for by Ordinances passed respectively on the 26th day of June, 1843, and February 13th, 1844, and for special tax assessed for grading St. Clair street as provided for by Ordinance passed June 25, 1845, together with the certificate and notice thereto attached as entered and recorded on pages 265, 266, 267, 268, 269, 270, 271, 272, 273, 374, and 275, of this book, is a true and correct copy of a delinquent list, certificate and notice which was published in the Toledo Blade, a newspaper printed in said city and of general circulation therein, and that the same was published and continued in said paper for and during 4 consecutive weeks between the first day of October and the first day of December in the year 1847.

In Witness Whereof, I have hereunto set my hand and the seal of said city the day and year above written.

[Seal of the City of Toledo, Incorporated 1837.]

CHARLES I. SCOTT,
Clerk of the City of Toledo.

Above page 275, Tax Record 1847.

Tax Record 1846-47, Page 311, 312 and 313.

27.

"EXHIBIT E E."

Record of Sales of Lots and Parts of Town Lots for the Special Taxes Charged Thereon Assessed Under an Ordinance Passed June 26, 1843, as Appears by the City Tax Duplicate for 1847.

Names of owners.	No. of lot.	Vistula division.	Grade tax.	Am't sold.	Time of sale.	Name of purchaser.
Henry Anderson	18	Vistula	66.57.0	7-8	Dec. 27,	C. M. Dorr.
	19		66.57.0	whole	Dec. 27,	C. M. Dorr.
	20		66.57.0	whole	Dec. 27,	C. M. Dorr.
	31		76.56.0	whole	Dec. 27,	C. M. Dorr.
	32		76.56.0	whole	Dec. 27,	C. M. Dorr.
	33		76.56.0	whole	Dec. 27,	C. M. Dorr.
	34		76.56.0	whole	Dec. 27,	C. M. Dorr.
	1000		499.27.0	2-3	Dec. 27,	C. M. Dorr.
	1001		549.20.0	7-8	Dec. 27,	C. M. Dorr.
	1008		166.42.0	7-8	2 2	C. M. Dorr.
	1009		199.70.0	7-8	2 2	C. M. Dorr.

The above is from page 311.

Unknown owners	30	Vistula	99.86.0	whole	2 2	C. W. Hill.

The above from page 312.

Unknown owners	1008½		46.60.0	whole	2 2	T. W. Hough

Being all that piece of land or lot lying between lot number
106 20 Vistula Division and lot number 1008 addition to Vistula being 21 feet front on Lynn street running Easterly 82 1-2 feet from Lynn street.

The above is from page 313.

Tax Record, Year 1847, Page 321.

28.

"EXHIBIT E E—Continued."

CLERK'S OFFICE,
CITY OF TOLEDO, *February 7th,* 1848.

STATE OF OHIO,
Lucas County, ss:

I, Charles I. Scott, clerk of the city of Toledo aforesaid, do hereby certify that in conformity *of* the Charter of said city and certain

notices of sale, true copies of which are entered and recorded upon the pages 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, and 275 of this book, Chas. S. Whitney.

Treasurer of said city attended at the Council Chamber therein on the last Monday, being the 27th day of December, 1847, and *then* at and after the hour of ten o'clock in the forenoon of that day, proceeded to sell and offer for sale separately each tract of land and each town lot and parts of tracts of land and parts of town lots recorded on the 138 page and the subsequent pages of this book to the 263 page inclusive on which the tax had not been paid, and then continued said sale of lots and lands and parts of lots and lands recorded on the last before mentioned pages from day to day by adjournment until the — day of January following, when the whole of said tracts and parts of tracts of land, and town lots and parts of town lots, herein before recorded on pages 277, 278, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320 and 321, of this book had been sold; and that I attended there at the commencement of said sale, and then made a true and — record of said sale as the same progressed, which said record is recorded on the pages last before mentioned, and that said tracts of lands and parts thereof, and said town lands and parts thereof in said record contained are there described as the same were described in the list and advertisement mentioned in a certified record upon pages 265 to 275 inclusive of this book of Special Taxes and the taxes mentioned in the Treasurer's notice recorded on page 264, levied to defray the current expenses of the city of Toledo for the year 1847, recorded on the 138 page and subsequent pages of this book, and that all the records stated in said record are true.

In Testimony Whereof, I hereunto set my hand and corporate seal of said city on the day and year first above written.

107 [Incorporated Seal of the City of Toledo, Incorporated 1837.]

CHARLES I. SCOTT,
City Clerk.

The defendant next offered and read in evidence certain files in the suit of Lot Clarke vs. The City of Toledo, which files are in the words and figures following, to-wit:

Lot Clark vs. Toledo, Papers 1 to 6.

Sup. Court.

In Chancery.

LOT CLARK
vs.
THE CITY OF TOLEDO.

It is stipulated in this cause that complainant may file a bill of review within thirty days after the present term of this court and

that Def'ts will enter their appearance thereto as of the present term.

E. D. POTTER,
Mayor of Toledo.
JOHN FITCH,
Sol. for Comp't.

Dated Aug. 7th, 1847.

The foregoing contains the following endorsement:
Sup. Court. Stipulation. Lot Clark vs. The City of Toledo. Filed August 7, 1847.

2.

MAUMEE CITY, *Nov.* 15, 1845.

Received of F. L. Nichols, Clerk of the Supreme Court of the County of Lucas the papers in the case of Henderson W. Horton & James Horner, and papers in the case of Lot Clark vs. City of Toledo and Thomas D. Thomas.

Said papers to be delivered to the Court in Bank at Columbus.

E. LANE.
Att'y in Both Cases.

The foregoing contains the following endorsement:
Judge Lane's Receipt for papers in case of Horton vs. Horner and Clark vs. Toledo.

3.

THE STATE OF OHIO,
Cuyahoga County, ss:

Supreme Court, August Term, A. D., 1846, Held by Judges Wood, Reed and Hitchcock.

Chancery.

LOT CLARK
vs.
THE CITY OF TOLEDO.

Reserved in Lucas County to be Decided on the Circuit and Certified Back and Entered as of the Last Term.

This cause came on for hearing upon the bill, answers, exhibits and evidence and was argued by counsel.

108 Whereupon the Court on Consideration find that the equity thereof is with the Defendant.

It is therefore ordered that the said Bill stand dismissed at the Complainant's costs to be paid in sixty days—and on failure to do so—to be collected as upon executions at law—Ordered that this entry be certified to the Clerk of the Supreme Court of Lucas County to be entered as of last term—Judge Reed did not sit as judge in this cause.

THE STATE OF OHIO,
Cuyahoga County, ss:

I, Aaron Clark, Clerk of the Supreme Court in and for the County of Cuyahoga hereby certify that the foregoing is a full and true copy of the Journal entry made in said cause at the August term thereof 1846.

Witness my signature and the seal of said Court at the City of Cleveland this 20th day of August, A. D. 1846.

[Seal of the Supreme Court of the State of Ohio.]

A. CLARK, *Clerk S. C.*

Fees $1.00 paid by Judge Lane (minus 50c.)

The foregoing contains the following endorsement:
Certificate of Decree. Lot Clark vs. The City of Toledo.

4.

THE STATE OF OHIO,
Lucas County, ss:

To the Sheriff of our said County, Greeting:

We command you, That you summon the City of Toledo and Thomas S. Thomas to appear before the judges of our Supreme Court, at the Court House on the first day of our next term ensuing, to answer a petition in Chancery exhibited against them by Lot Clark, and this they shall in no wise omit under the penalty of one thousand dollars. And have then and there this writ. Witness: F. L. Nichols, Clerk, P. T., of our said Court, at Maumee City, this 27th day of December Anno Domini, one thousand eight hundred and forty-four.

[Seal Supreme Court, Lucas County, Ohio.]

F. L. NICHOLS,
Clerk P. T., S. C. Lucas County, Ohio.

The foregoing contained the following endorsements:

I served this writ December 28th, 1844, personally, upon the said city of Toledo, by delivering an attested copy of said writ to George B. Way—Mayor of said city—and one to Samuel B. Scott, Clerk of said city—and also delivered an attested copy to the said Thomas D. Thomas who is Marshal of said city of Toledo.

E. S. FROST, *Sheriff.*

109 Supreme Court, Lucas County, Ohio. Lot Clark vs. City of Toledo and Thomas D. Thomas. Subpœna in Ch'c'y. Injunction allowed and bail given. F. L. Nichols, Clerk, P. T., Supreme Court, Lucas County, Ohio. John Fitch, Sol. for Comp't.

6.

THE STATE OF OHIO,
Lucas County, ss:

To the Judges of the Court of Common Pleas within and for said County, Greeting:

Whereas at the July term of our Supreme Court held within and for said County of Lucas and State of Ohio on the 21st day of July A. D., 1846 sitting as a court of Chancery in a certain cause wherein Lot Clark was complainant and the city of Toledo and Thomas D. Thomas, Defendant a certain decree was rendered as follows, to-wit. "This cause came on for hearing upon the Bill, Answers, Exhibits and evidence and was argued by Counc*il*. Whereupon the court upon consideration find that the equity thereof is with the Defendant, it is therefore ordered that the said Bill stand dismissed at the complainants costs to be paid in sixty days, and on failure to do so to be collected as upon executions at law.

We therefore command you that without delay you cause execution to be had of the said decree of our said Supreme Court according to law.

Witness F. L. Nichols, Clerk of our said Supreme Court within and for said County of Lucas this 12th day of October, A. D., 1846.

F. L. NICHOLS,
Clerk L. C. S. C.

[Seal Supreme Court, Lucas Co., Ohio.]

Lucas Supreme Court. Lot Clark vs. City of Toledo and Thomas D. Thomas. Mandate. Filed Oct. 12, 1846.

STATE OF OHIO,
County of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1846. In Bank.

No. 88.

LOT CLARK
vs.
CITY OF TOLEDO and als.

Reserved from the County of Lucas.

110 Ordered by the court that this cause be remanded and continued.

Ordered that a copy of this entry be certified to the Clerk of the Supreme Court of Lucas County for entry, etc.

I, Lawson E. Emerson, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is in bank, truly taken and correctly copied from the Records of said court, to-wit: from Order Book No. 3, page 108.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this 8th day of December, A. D. 1906.

[Seal of the Supreme Court of the State of Ohio.]

L. E. EMERSON, *Clerk*,
By A. C. TAYLOR, *Deputy*.

The foregoing is endorsed as follows:

Supreme Court of the State of Ohio. Lot Clark vs. City of Toledo and als. No. 88. Certified Copy of Entry.

5.

THE STATE OF OHIO,
Lucas County, ss:

Supreme Court, July Term, A. D., 1846.

THE LOCKPORT BANK AND TRUST CO.
vs.
CITY OF TOLEDO et al.

Taken on the circuit under advisement.

CHARLES BUTLER et al., Trustees of American Land Co.
vs.
THE CITY OF TOLEDO.

Taken on the circuit under advisement.

THE STATE OF OHIO,
Lucas County, ss:

I, Francis L. Nichols, Clerk of the Supreme Court of the State of Ohio in and for the County of Lucas do hereby certify that the above are true copies taken from the Docket of said Supreme Court of the term of July, A. D. 1846.

[Seal Supreme Court, Lucas Co., Ohio.]

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court this 10th day of November A. D., 1846.

F. L. NICHOLS,
Clerk L. C. Sup. Court.

[Seal Supreme Court, Lucas County, Ohio.]

111 The foregoing contains the following endorsements:

Lockport Bank and Trust Co. vs. City of Toledo. Trustees of American Land Co. vs. City of Toledo. Cl'k's C't'f.

It was then agreed by counsel for plaintiff, in open court, that By each of the tax duplicates of the city of Toledo for each of the years 1843, 1844, 1845, 1846, 1847 Lot Clark appears as the owner of the following lots and parts of lots in the Port Lawrence Division in the said city, to-wit:

The east twenty-eight (28) feet of three hundred and eighty-seven (387), three hundred and eighty-eight (388), the west half (½) of three hundred and eighty-nine (389), the east twenty-eight (28) feet of three hundred and ninety-nine (399), four hundred (400), the west half (½) of lot four hundred and one (401) and twenty (20), and that he was charged on each of said duplicates with the proportionate amount of said Vistula grade assessment appropriate to each of said parcels of property.

And by said duplicates for said years it further appears that said Lot Clark was also the owner of the following lots in the Vistula Division of said city, to-wit: sixty (60), sixty-nine (69), seventy (70) and seventy-one (71), and that he was charged on each of said duplicates with the proportionate amount of said Vistula grade assessment appropriate to each of said parcels of property.

It was agreed by counsel for the plaintiff that said files were produced by the County Clerk of Lucas County, Ohio, and that said Clerk, if sworn, would testify that he searched diligently for other records in said causes and found no other record of the transaction.

To the introduction of said files, the plaintiff objected on the ground of incompetency, immateriality and irrelevancy, which objection was by the Court overruled and plaintiff excepted.

Thereupon the defendant offered the following paper, to which the plaintiff objected on the ground that the same was incompetent, immaterial and irrelevant, which objections were overruled and plaintiff thereupon excepted.

To the Council of the City of Toledo:

The undersigned, acting under resolutions of the Council passed on the 7th inst., would respectfully report.

112 That he has conferred with the Hon. E. Lane in relation to the suits against the city involving the special grade taxes, and also in relation to the services of Lane & Wilcox rendered therein.

In the suit of Lot Clark vs. The City, which has been decided, the injunction bond is a security for nothing but costs, and an execution has been ordered for their collection.

The certiorari case, by which the whole tax was supposed to be carried into the Supreme Court and its collection stayed, appears never to have got upon the docket of the Supreme Court in this Court, and so far as I can judge, might at all times have been disregarded with perfect safety. If a certiorari bond was executed and filed, conditioned so that interest and costs can be recovered, would it not be well to have the cause docketed and dismissed, with a view to a recovery on the bond.

The other suits against the city, in Chancery, are shown by the docket to have been taken on the Circuit under advisement, and the

papers are probably somewhere on the Circuit. Under Judge Lane's instructions, I have obtained the particular certificates in these causes and forwarded to him. He will have these causes disposed of, and certified back to the Co. They seem to have been included in the agreement made by the counsel for the city with John Fitch, Esq., providing that the Lot Clark case should dispose of the other two, but Mr. Fitch, I am informed, chooses not to be bound by that agreement, so that further action of the part of the city is required.

The account presented in behalf of Lane & Wilcox for professional services, is intended, as I am informed by Judge Allen, to cover all the services which they have rendered or may render, in any and all of said suits. And, considering the amount involved, their importance to the city, and the fact, that seems to be claimed and admitted by Mrs. Morton—the opposite counsel and others—that the city is more indebted to Judge Lane's distinguished ability, in the management of these suits, than to any other cause, for the success of the city—I do not hesitate to say that I think the charge of $400 reasonable and entirely within the ordinary limit.

It is the wish of Judge Lane that the balance be divided into two equal amounts and orders issued therefor, one payable to him, and the other to P. B. Wilcox, and forwarded to him by mail.

I submit the following resolution and recommend its adoption:

113 Resolved: That two warrants be drawn on the treasury for $188.25 each, one payment to the Hon. E. Lane, and the other to P. B. Wilcox, Esq., out of the general fund in full for their services to the city, rendered or to be rendered, in relation to the tax assessed for the Vistula and Port Lawrence grades, in the suits that have been, or are now pending against the city. And that said orders be forwarded to Judge Lane.

CHAS. W. HILL,
Special Com'll.

To the introduction of this evidence, the plaintiff objected upon the grounds of incompetency, immateriality and irrelevancy, and the objection being by the court overruled, plaintiff excepted.

Circuit Court of the United States, Northern District of Ohio, Western Division.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL MESSINGER, Defendant.

Stipulation.

In the above entitled case it was on the trial thereof agreed by and between the parties to this case, that the original charter of the city of Toledo, Ohio, and the amendments thereof, contained in the Local Laws of the State of Ohio (for the years 1837, 1845 and 1846 being Volume 35 of Local Laws, page 32 and following,

Volume 43 page 350 and Volume 44, page 208, and following should be read and considered by the court without being formally introduced or read as evidence in the case, and should not be made a part of any bill of exceptions taken in this cause, but that the same may be read and considered, and shall have the same force and effect by and in the higher courts, as if made a part of a bill of exceptions.

PETER ANDERSON,
By RHEA P. CARY,
C. H. TRIMBLE AND
C. A. THATCHER,
His Attorneys.
KING & TRACY,
CLAYTON W. EVERETT,
OLIVER B. SNIDER,
Attorneys for Defendant.

At this point the court inquired of counsel for defendant as follows:

"Have you concluded all your evidence as to the tax title?" To which counsel for defendant replied, "I think so."

Thereupon counsel for the plaintiff objected generally, severally, respectively and separately to the introduction of the records
114 hereinbefore set out upon the ground that each and all of them were incompetent, immaterial and irrelevant, and upon the further ground that the title to the property involved which was acquired by the defendant and his predecessors in title could have been nothing more than a life estate; that it was incumbent upon the life tenant to pay the taxes upon the property, and that he could acquire no greater right than that by purchase at a tax sale.

Counsel for plaintiff asked leave to further object to said records upon the grounds of their in-sufficiency, after sufficient time had been granted counsel for plaintiff to examine the records just offered.

The court overruled the objections for the time being, but granted the request of the plaintiff. To the action of the court in so overruling said objection the plaintiff then and there duly excepted.

At this point in the proceedings an adjournment was taken and upon reconvening counsel for defendant with more particularity specified the local laws heretofore offered in evidence, by stating that they were contained in Volume 44 of the Session Laws of 1846 of the State of Ohio at pages 208 et seq. and Volume 37 of the Session Laws of Ohio, at page —

At this point counsel for defendant announced that defendant rested.

Further to maintain the issues upon his part the plaintiff then offered in evidence in rebuttal Section 9 of Stipulation No. 1, which is in the words and figures following, to-wit:

"9th. That Peter Anderson and Walter Goodman of Holly Springs, Mississippi, two of the executors of the will and trustees of the estate of Henry Anderson, deceased, executed a deed purporting to convey to said Charles Butler, all the real estate involved in this

action, which deed was duly signed, sealed, acknowledged and executed by said Peter Anderson and Walter Goodman as said Executors and Trustees according to the laws of the State of Ohio, in the presence of two witnesses, who signed as such and said deed was dated October 1st, 1855, but was not delivered until about the first of May, 1860, and was recorded on May 2nd, 1860, on page 110 of Volume 34 of the record of deeds of Lucas County, Ohio; a copy of said deed is hereto attached and marked Exhibit B, and hereby made a part hereof. The foregoing statement as to delivery of said deed, shall not preclude defendant from offering proof as to facts which may establish a conditional or other earlier 115 delivery of said instrument, subject, however, to provisions of paragraph 18 hereof. That said Peter Anderson was a brother of Henry Anderson, deceased, and is not the plaintiff, although having the same name."

To said evidence the defendant objected and the objection was sustained, to which the plaintiff excepted.

To further maintain the issues upon his part the plaintiff next offered in evidence two letters, which are in the words and figures following, to-wit:

No. 12 Wall St.,
New York, *2nd March*, 1860.

W. Goodman.

My Dear Sir:—I have just received your letter of the 22nd February, after I had written to you on the 9th Mr. Bronson, the party who was negotiating with me for the Toledo property, came to New York and wanted to negotiate for the entire block instead of a part of it, as had been talked of; after three days constant at it we concluded a bargain, the details of which I have communicated to you, for the whole block at $17,500, but he became uneasy about the situation of the title and would not agree to pay any money till I was prepared to give him a good deed with certificate of title. I enclose a copy of the clause in the agreement between us that you may understand perfectly the great importance to me of having the deed now lying in the Manhattan Bank in escrow delivered to me that I may take a proper deed of warranty to Mr. Bronson as early as practicable that he may have no possible excuse for backing out, which would now be serious to us all.

I also hand you copy of the account as finally settled on 1 October, 1854, by you and Mr. Anderson, and which we had before us on 1 October, 1855; you and Mr. Anderson being then here and at which date you executed the deed and lodged it in escrow with W. C. Halstead, of Manhattan Bank, to be delivered to me on the order of either of you.

Since then the only payment made was of $1,000 to Peter Anderson on 1 January, 1857 of which you have also a statement, as you recollect. I hold his draft paid by me for it. By the terms of the agreement with Jones made in 1852 after he became of age, as you recollect, I was to pay 6 per cent. interest. In the fall of 1855 when we had the final adjustment here I agreed to pay 7 per cent after that date and I have so computed the amount, making $9,183.88, on 1

January last. This of course is simple interest and is in accordance with our understanding.

If you will give me an order on Mr. Halstead for the
116 deed I will lodge with him a stipulation to pay over the money to be received from Mr. Bronson on the first day of May (the $2,000 and interest on it from 26 Dec. last) and also to place with him the bond and mortgage or notes and mortgage which I am to take from Mr. Bronson for $15,000 duly assigned by me to James H. Anderson as collateral security for the payment of the balance due from me. I want to place the papers at the earliest day practicable in the hands of the lawyer, M. R. Waite, Esq., of Toledo, whose certificate of title I am bound to furnish to Mr. Bronson. Of course there is no transfer of title till the whole thing is consummated.

Please give your attention to this to aid me in perfecting this sale, which I have labored to accomplish to effect the payments to Mr. Anderson.

I will write you on other matters in another letter.

In haste, truly yours,

CHARLES BUTLER.

No. 12 Wall St.,
New York, 25 *Feb'y*, 1860.

My Dear Sir: Enclosed I hand you copy of letter to James H. Anderson, relative to the sale of my Toledo property, which I have accomplished after a great deal and very protracted negotiations dating back to last spring, and to a most excellent, prompt and responsible purchaser. He is one of the largest tobacco manufacturers in the west, and his capital is embarked in that. He intends to proceed immediately on obtaining his title to improve the property and to erect extensive buildings. He holds my contract to make a good title on or before the 1st May on which he pays $2,000 and interest to that date on it. Another payment will be made on 20th July of $465, and on the 20th of January following $2,465.

I am to take his bond and mortgage for the balance of $15,500 on the first of May, which bond and mortgage I will assign and deposit with Mr. C. O. Halstead in Manhattan Bank. The deed to me you will recollect is in Mr. Halstead's hands in escrow, deposited by you some years ago, and this I shall have to have delivered to me to enable me to make my warrantee deed to Mr. Bronson; and now my dear sir, you will see at once the importance of this matter to me and of your co-operation to enable me to close with Mr. Bronson, and the sooner the better.

He will pay the money as soon as he can get the title on receiving 15 days' notice. I should despair of finding another purchaser at so good a price in ten years again if this should fail me. The amount of principal and interest due from me is a little over $9,000 on the first of January instant. The amount of this sale is
117 $17,500, the cash payment to be immediately paid James, and the bond and mortgage assigned. I should add that the water lot is not included in my sale. That is in dispute in respect

to title and quantity, and having no improvement on it is of very little value, and could not be sold for anything, nor could I make title to it.

I hope to see you here in March or April and beg that you will aid me in closing this sale. I want the deed as soon as I can get it, and this can only be delivered on your order. My stipulation is to have all the papers at Toledo on or before the first of May, and my plan would be to have them all here in the hands of my counsel, Mr. R. Waite, Esq., to be delivered and put on record simultaneously on payment of the $2,000, and the execution and delivery of the bond and mortgage by Mr. Bronson. Mr. Waite can also act for you and receive the money and take the bond and mortgage if you desire, but I presume you would consider me your agent for that purpose.

Please let me know at what time you expect to come on North, and what, if anything more, is required of me before you leave home.

In haste, dear sir, truly yours,

CHARLES BUTLER."

H. Goodman, Esq., Holly Springs, Miss.

To the introduction of said evidence the defendant objected upon the ground of incompetency irrelevancy and immateriality and for the want of any proof to bring them to the knowledge of Calvin Bronson or the defendant or any one under whom he claims title and because they do not tend to show that the deed was not delivered.

The objection was overruled by the court subject to further action by the court and the defendant excepted.

To further maintain the issues upon his part the plaintiff next offered and read in evidence in rebuttal Exhibit E to Stipulation No. 1, being the contract of October 4th, 1841, between Henry Anderson and Charles Butler, and hereinbefore set out and shown. To this document defendant again objected upon the ground of incompetency, irrelevancy and immateriality and the objection being overruled by the court the defendant excepted.

To further maintain the issues upon his part the plaintiff offered and read in evidence in rebuttal Sections 1, 2 and 6 of Stipulation No. 2 and Exhibit A thereto, which Sections and Exhibit respectively are in the words and figures following, to-wit:

"SEC. 1. It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attor-
118 neys, that Charles Butler, under whom the defendant claims title to the real estate made the subject of this action, died at his then home in the city of New York, N. Y., on December 13th, 1897; that the written instruments, books, documents, statements, letters, press copies of letters and statements, and all other instruments described in Exhibit A hereto attached and hereby made a part hereof, were each and all at or shortly after the death of said Charles Butler found amongst and with the family and other papers of said Charles Butler; that each and all of said instruments were at all times after the death of said Charles Butler, until shortly after

the commencement of this case in the possession and custody and under the control of Miss Emily O. Butler, the only surviving child and sole heir at law of said Charles Butler, deceased; that shortly after the commencement of this case, said Miss Emily O. Butler, delivered each and all of said instruments to her cousin, Mr. Willard Parker Butler, at his law office No. 59 Wall Street, in the city of New York, N. Y., and that each and all of the instruments described in said Exhibit A are now produced by him; that each and all of said written instruments, books, documents, statements, letters and press copies of letters and statements, and other instruments, described in said Exhibit A were written prior to and more than thirty years before the commencement of this cause; that to avoid the taking of depositions herein and thus subserve the mutual convenience of both parties hereto and reduce the expenses of said parties, each and all of said instruments described in said Exhibit A shall, upon the execution hereof, be delivered to Mr. Oliver B. Snider, attorney-at-law of Toledo, Ohio, who shall transmit same to Toledo, Ohio, same there to be kept in his custody and under his control until said instruments, or any of them, shall be desired by either of the parties hereto for use upon the trial of this case, when same shall be produced by him for such use, and any further or other proof whatsoever with respect to the genuineness and authenticity of any and all of said instruments described in said Exhibit "A" shall be and hereby is dispensed with, and said instruments, or any of them, described in said Exhibit "A" may be offered in evidence at the trial of this cause by either of the said parties without formal notice to produce them, or any of them, any such notice being hereby waived, any such offer, however, or any of said instruments to be subject to objections for want of competency or relevancy for reasons other than the genuineness and authenticity of said instruments or of any of them, or the omission to give formal notice to produce same.

119 "SEC. 2. It is further hereby stipulated and agreed by and between said parties, by their respective attorneys, that until the trial of this cause only the attorneys of record therein shall be entitled to examine said instruments and until the final determination of this cause said instruments shall at all times remain in the possession and under the custody and control of said Mr. Oliver B. Snider, or his legal representatives, when the same shall be returned to said Mr. Willard Parker Butler, and copies of said instruments received in evidence may be substituted for the originals for making up the record in this case.

"SEC. 6. It is further agreed that at the time the executors and trustees of the will of Henry Anderson, deceased, turned over to James H. Anderson, in settlement of their trust, the property and effects coming to him under said will (which took place some time prior to May 1st, 1860) the note last herein referred to, had not been fully paid or extinguished, and that if any payments were thereafter made and intended as credits upon said note, the same were made to James H. Anderson. But either party shall be at liberty to offer proof concerning the precise date when the executors and trustees of Henry Anderson, deceased, were finally discharged, such proof to be subject to all legal objections.

"EXHIBIT A."

"Referred to and Made a Part of the Foregoing Stipulation.

"*List of Written Instruments, Books, Documents, Settlements, Letters, Press Copies of Letters, and Statements and All Other Instruments Delivered to Oliver B. Snider, Esq., of Toledo, Ohio, by Willard Parker Butler, Esq., of New York City, N. Y., on the First Day of June*, 1905.

1. Letter book marked "C. Butler's letters, June, 1847 to April, 1849."

2. Letter book marked "Business letters from May, 1849 to January, 1852, Charles Butler."

3. Letter book marked "Letters, Charles Butler, January, 1857 to August, 1860."

4. Letter book marked "C. Butler's letters, August 1860, to August, 1867."

5. Letter file marked "Letters received, January, 1859, to December, 1849."

6. Letter file marked "Letters received, January, 1850, to October, 1851."

7. Letter file marked "Letters Mississippi from —— to —— the first letter being dated March 27th, 1857.

8. Letter file marked on back "Letters received Mississippi
120 from —— to ——." The first letter being dated April 21st, 1854.

9. Bundle of miscellaneous letters from Peter Anderson, Henry Anderson, Walter Goodman, John Fitch and Morrison R. Waite to Charles Butler.

10. Envelope containing receipts of Walter Goodman, Executor Peter Anderson, Executor, Statement of account dated September 27th, 1852; original note for $7,430.40 dated October 1, 1853; draft for $2,172.70 drawn by James H. Anderson at Memphis, Tennessee, March 8th, 1861, on Charles Butler, No. 12 Wall Street, New York, and stamped "Received payment. American Exchange National Bank."

11. Bundle containing original papers Exhibit B to G inclusive mentioned in stipulation, bearing like date herewith; also certified copy of deed of Edson Allen, Master, to Henry Anderson, dated 18th day of November, 1844.

12. Release Henry Anderson to Edward Bissell.

Any other letter press copy books of Charles Butler than those above described between 1852 and 1857 have been searched for and cannot be found.

RHEA P. CARY, *Atty.*
ROSEWELL E. MESSINGER,
By KING & TRACY,
CLAYTON W. EVERETT, AND
O. B. SNIDER,
His Attorneys."

To each and every part of this evidence the defendant objected upon the ground of incompetency, irrelevancy and immateriality and the objection being by the court over-ruled, the defendant excepted.

To further maintain the issues upon his part the plaintiff next offered in evidence in rebuttal Section 3 of Stipulation No. 3, which is in words and figures following, to-wit:

"Third: That on May 7th 1860, Charles Butler wrote a letter to Walter Goodman, Executor, stating that he was indebted to the estate of Henry Anderson on May 1st, 1860, in the sum of nine thousand three hundred and sixty and ninety-seven hundredths dollars ($9360.97)."

To this evidence the defendant objected, and the objection being by the court overruled the defendant excepted.

To further maintain the issues upon his part the plaintiff next offered in evidence in rebuttal the whole of Stipulation No. 4, which is in the words and figures as follows, to-wit:

121 "In the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

Cause No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Stipulation No. 4.

"In the above entitled case it is hereby stipulated, that the letters written and sent by Charles Butler of New York City, to Henry Anderson of Holly Springs, Mississippi, Walter Goodman, Peter Anderson and James H. Anderson or either of them, and the letters from The Manhattan Bank of New York City, to said parties or either of them, and all accounts, documents, statements and schedules accompanying and mentioned in said letter are lost or destroyed.

That subject to such objections as to competency or relevancy and materially as might be made against originals were they in existence and duly produced and proven in open court the letter press copies of said letters, accounts, statements and schedules now in the possession of the defendant, mentioned in the notice of the defendant to the plaintiff, dated May 2nd, 1905, for the production and inspection of the original of said letters, documents, schedules and accounts may be read in evidence on the trial of this case, with the same force and effect the originals would have were they in existence, produced and proven in open court.

"But no admission is hereby made as to the competency of the originals were they produced and proven as aforesaid, but such competency and relevancy is to be first determined by the court.

Said copies now in the possession of said defendant shall at all rea-

sonable times be open to the inspection of the plaintiff's counsel at the office of Clayton W. Everett, 410 Valentine, Toledo, Ohio.

"In witness whereof the parties do sign their names to duplicates hereof by their respective counsel this 13th day of May, A. D. 1905.

PETER ANDERSON,
By C. A. THATCHER, *His Atty.*
KING & TRACY, AND EVERETT,
By C. W. EVERETT,
Attys for Defendant."

The evidence was objected to on the ground of incompetency, immateriality and irrelevancy and upon the further ground that the same was not binding on the defendant. The objection was overruled by the court, and the defendant excepted.

122 At this point the plaintiff rested.

Thereupon counsel for the defendant asked leave of the court to introduce one remaining piece of documentary evidence, being the record of the Probate Court of Lucas County, Ohio, of the proceedings in connection with the Probate of the will of Henry Anderson, deceased. The court announced that the facts were sufficiently stated to warrant a delay for the purpose of securing such evidence.

Thereupon counsel for the defendant offered in evidence a certified copy of the contract of sale between Charles Butler and Calvin Bronson dated February 18th, 1860, which is in the words and figures following, to-wit:

29.

Charles Butler
to
Calvin Bronson.

Contract.

Articles of Agreement, made the eighteenth day of February, 1860, between Charles Butler of the City of New York of the first part and Calvin Bronson of the City of Toledo of the second part. Witnesseth, that the said party of the first part for and in consideration of the sum of seventeen thousand five hundred dollars to be in hand paid has contracted and agreed to sell to the said party of the second part all those certain pieces or parcels of land situate in the City of Toledo in the County of Lucas and State of Ohio in the Vistula Division of said City between Cherry and Lynn Streets viz:

Lot Nos. one thousand and eight (1008), one thousand and nine (1009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), and the whole of lot number one thousand (1000) next to and adjoining said lot number thirty-four (34), also the whole of lot number one thousand and one (1001) and Nos. eighteen (18), nineteen (19), twenty (20), and twenty-one (21), being the entire block of land bounded by Summit, Cherry, Water

and Lynn Streets in said City of Toledo, in the Vistula Division thereof, excepting and reserving from said premises a lot not exceeding sixty feet in front on Lynn Street extending back same width not exceeding eighty feet in depth, on which the Bethel Church now stands which the party of the first part agreed to give the Western Seamens Friend Society as a building site for a Bethel Church to be used and occupied for such and no other purpose which lot may be measured thirty feet each way from the center of the church as it now stands on Lynn Street aforesaid and reserving all the right and interests of the said Church and Society in said lot by virtue of any agreement with said party of the first part. And the said party of
123 the first part covenants and agrees to execute and deliver to the said party of the second part a good and sufficient deed for the said premises in which his wife shall join containing covenants of warranty against the claims of all persons whomsoever except claims for taxes and assessments levied or assessed on said premises since the 26th day of December 1859, and excepting and reserving therefrom the Bethel Church lot above mentioned. Provided and upon the condition nevertheless that the said party of the second part, his heirs or assigns pay to the said party of the first part his heirs or assigns for the said premises the sum of seventeen thousand and five hundred dollars lawful money of the United States of America payable as follows: The sum of two thousand dollars on the first day of May 1860, with interest at the rate of six per cent from the said 26th day of December 1859, the balance of fifteen thousand five hundred dollars to be paid in seven equal annual payments from the 20th day of January, 1860 of two thousand dollars each and one payment of fifteen hundred dollars in eight years from said date the first installment of two thousand dollars to be paid on or before the 20th day of January 1861, with interest from the 20th day of January 1860, on the whole principal sum paid at the rate of six per cent per annum the interest to be paid semi-annually on the twentieth day of the months of July and January in each year on the whole principal sum remaining due and unpaid and the said party of the first part hereby further agrees to furnish to said party of the second part at or before the delivery of the deed aforesaid a written abstract of the title to the above described premises together with the certificate of Morrison R. Waite of Toledo, Ohio, that the said party of the first part has a good and valid title thereto and that said premises are free and clear of all incumbrances whatsoever except taxes and assessments levied or assessed thereon since the 26th day of December, 1859. And the said party of the second part for himself, his heirs, executors and administrators doth covenant and agree to and with the said party of the first part his heirs and assigns that the said party of the second part will pay the said several sums as they severally become due with the interest aforesaid without deduction of any taxes or assessments which may have been levied or assessed on said premises since the 26th day of December 1859, or which may hereafter be levied or assessed thereon. And it is further agreed between the parties to these presents that if default be made in fulfilling this agreement on the part

of the said party of the second part then and in such case the
124 said party of the first part, his heirs and assigns shall be at liberty to consider this contract as forfeited and annulled and to dispose of said premises to any other person in the same manner as if this contract had never been made. It is further agreed between the parties hereto of the first and second part that the consideration money of seventeen thousand five hundred dollars to be paid as aforesaid and the interest thereon made be paid at Toledo, Ohio, in gold or silver lawful money of the United States or in sight exchange or drafts on the City of New York at par to Peter F. Berdan or such other person at Toledo as the said party of the first part or his assigns may authorize to receive the same. And the said party of the first part hereby further covenants and agrees to and with the said party of the second part that on or before the first day of May, 1860, he will have said deed, abstract of title and certificate of Morrison R. Waite as aforesaid at Toledo ready to be delivered to the said party of the second part on the payment of the said sum of two thousand dollars and the interest thereon falling due on said first day of May, 1860, and that upon such payment he will deliver the same to the said party of the second part and will receive from him his notes or bonds secured by mortgage on said premises for the balance of the purchase money to be paid as hereinbefore provided and it is hereby expressly understood and agreed between the parties hereto that the said party of the second part shall not be required to pay said instalment of principal and interest falling due on the first day of May, 1860, or either installment or principal of interest falling due thereafter or be considered or held to be in default in the fulfillment of this contract on account of the nonpayment of any or all of said installments of principal and interest aforesaid until the said party of the first part shall have delivered to the said party of second part the deed, abstract of title and certificate of said Waite as aforesaid. And the said party of the first part hereby further covenants and agrees at the time of the delivery of the deed -foresaid to give and grant to the said party of the second part a perpetual right to construct and maintain a sewer of such dimensions and in such manner as he may cho-se through his dock property at the foot of Cherry Street into the River provided that if a public sewer be constructed by the City to the River through Cherry Street it shall be adopted by the said party of the second part and if that such sewer be established by the City of Toledo and allowance be made therefor to owners of property the party of the first part shall be entitled to receive of the
City the amount of any award which may be made therefor in
125 respect to his property so used. And the said party of the first part agrees also to grant by Quit Claim deed to the said party of the second part in which his wife shall join any reversionary interest which he may have or be entitled to in the said Bethel Church lot if from any cause the same should revert by reason of abandonment of or now user of the said premises by the said Society for the purposes designed and expressed in the grant of the same or otherwise and subject to all burdens and charges which in such reversion

may appertain to the same and that he will do no act or thing to alter, vary or affect his legal and equitable liabilities in regard thereto.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

CHARLES BUTLER. [SEAL.]
CALVIN BRONSON. [SEAL.]

Sealed and delivered in presence of,
WILLIAM CUTLER.

Received for record March 3rd, 1860 and recorded same day, Vol. 33 of Deeds, pages 564, 565 and 566.

JONATHAN WYNN,
Recorder

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, county recorder of Lucas County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain Deed recorded in Volume 33 of the Record of Deeds of said Lucas County at Page 564, which said Record of Deeds is in the Office of County Recorder of said Lucas County, and is in my custody and control as such County Recorder.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D. 1905.

THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

To this evidence the plaintiff objected on the ground of incompetency, irrelevancy and immateriality, and upon the further ground that the same was not properly rebuttal evidence. The objection was by the court overruled, and the plaintiff excepted.

The defendant next offered in evidence Sections 3, 4, 5, and 7 of Stipulation No. 2, which sections respectively are in the words and figures following, to-wit:

"Sec. 3. It is further stipulated that Caleb O. Halstead, who is referred to in the letters described in Exhibit "A" was dur-
126 ing his lifetime the president of the bank of the Manhattan Company of the city of New York, and has been dead for many years; that Willard Parker Butler, with the cashier of said bank, has made careful and diligent search among the books, papers and records of said bank, as to the existence of the deed referred to in the correspondence set forth in Exhibit "A" as having been left with said Hal-tead at the Manhattan Bank, and no record or information concerning the same could there be found or obtained.

"No. 4. That Stanley H. Fleetwood, formerly of the city of New York, was for many years the confidential clerk for Charles Butler, and certain of the letters described in Exhibit "A" purporting to

have been written and signed by him, either in his own name or on behalf of Charles Butler, are in the handwriting of said Fleetwood.

No. 5. It is further agreed that the said Miss Emily O. Butler, and her cousin, Willard Parker Butler, have each made thorough search among the papers, books and documents of the said Charles Butler, deceased, for the note of $20,000 executed by the said Charles Butler to Henry Anderson to secure which the said Charles Butler assigned the Bissel mortgage referred to in another stipulation this day entered into between the parties hereto; that said note was not found among said papers, books or documents, nor has the same ever been seen by the said Miss Butler or her said cousin, but that among Mr. Butler's papers some time prior to the year 1904, there was found an envelope marked "Anderson Settlement" or something substantially to that effect, containing what appeared to be some letters, accounts and other papers, which said envelope and its contents were destroyed with other papers, all then supposed to be of no value, of the contents of said envelope nothing further is known.

"7th. The foregoing stipulation or any part thereof, may be used and read in evidence at the trial of this action, by either party, with the same force and effect that proof of the facts therein recited, would have were the same offered and proven in open court in the regular and ordinary way, and subject to all objections for competency, relevancy and materiality (save those excepted heretofore) that might be made against such proof and facts were they offered in the regular way in open court, either of the said parties being at liberty however, to offer additional proofs of the foregoing or other facts in this action, in support of their respective titles, subject to the same objections and exceptions."

127 To all of this evidence save and except Section 7 the plaintiff objected upon the ground of incompetency, irrelevancy and immateriality, and the objection being by the court overruled, plaintiff excepted.

Defendant next offered in evidence Sections 4, 5, 6, 7 and 9 of Stipulation No. 3, which are in the words and figures following to-wit:

"Fourth: That on January 1, 1857, Peter Anderson, one of the executors of Henry Anderson's will, was paid by Charles Butler, the sum of four thousand dollars ($4,000.00) on the note of twenty thousand dollars ($20,000.00) made by said Butler.

"Fifth: That on May 7, 1860, there was deposited in the Manhattan Bank of New York City, by Charles Butler, to the credit of James H. Anderson, the sum of two thousand, forty-one dollars ($2,041.00) as a credit upon said note of twenty thousand dollars ($20,000).

"Sixth: That on August 9, 1860, Charles Butler mailed to James H. Anderson a check on the Manhattan Bank of New York City for five hundred dollars ($500.00) for credit on said note of twenty thousand dollars ($20,000).

"Seventh: That on February 1, 1861, there was deposited to the

credit of James H. Anderson in the Manhattan Bank of New York City the sum of two thousand four hundred nineteen and forty-nine hundredths dollars ($2,419.49) as a credit upon said note of twenty thousand dollars ($20,000).

"Ninth: The foregoing admissions are each and all to be subject to exceptions and objections for incompetency, irrelevancy and immateriality."

To all of said sections save and except No. 9 the plaintiff objected on the ground of incompetency, irrelevancy and immateriality, and upon the further ground that Sections 5, 6 and 7 tend to indicate payments made to the life tenant or for his account, and such payment is not binding upon the remainderman.

The objection was by the court overruled and the plaintiff excepted.

At this point it was agreed by counsel for plaintiffs that Probate Journal No. 2 from the Probate Court of Lucas County, Ohio, of date April 20, 1860, at page 349, contains the following entry:

"Will of Henry Anderson, deceased, Lucas County Probate Court, April 20, 1860. This day was produced in open court a duly authenticated copy of the last will and testament of Henry Anderson,
late of Holly Springs in the county of Marshall, in the State
128 of Mississippi, and of the probate thereof in the probate court of said county. And it now appearing that said will was executed and proved according to the laws of Mississippi and relates to lands of the decedent in this county, on motion to the court by Charles Butler, who is interested in the title to said lands, it is ordered that the said copy of said will and probate be, and the same are hereby, admitted to record in this county. And it further appearing in and by the terms of said will that Walter Goodman, Peter W. Lucas and Peter Anderson are named in said will as trustees of a certain portion of the estate of said decedent, and that decedent, by his said will, ordered and requested that bonds should not be given by his said trustees, and it not appearing that there is any sufficient cause for requiring said trustees to give bond in this state, it is ordered that they be and hereby are permitted to execute said trust so far as it relates to the estate of said decedent in this state without bond."

To this evidence the plaintiff objected upon the ground of incompetency, immateriality and irrelevancy, and the objection being by the court overruled the plaintiff excepted.

Defendant next offered in evidence Exhibit A of Stipulation No. 2 heretofore copied herein, and not here recopied.

Defendant next offered in evidence (by agreement of counsel in open court save and except as to incompetency, immateriality and irrelevancy) the following:

"It was admitted by both parties in open court, but the plaintiff objected to the competency, relevancy and materiality of the same, which objection was overruled by the court and to which plaintiff duly excepted, that the annual accounts and reports of the executors of the will and trustees of the estate of Henry Anderson, filed in the

Probate Court of Marshall County, Mississippi, show the following payments by Charles Butler to said executors and trustees upon the $20,000.00 note, dated July 1, 1841, executed by Charles Butler to Henry Anderson:

October 10, 1849, paid 5th report	$3,376.52
Oct. 10, 1849, paid 5th report	2,700.00
Oct. 1, 1851, paid 6th report	1,110.00
Oct. 1, 1852, credit by commission, 7th report	5,967.49
Oct. 1, 1852, by interest on same, 7th report	1,551.42
Oct. 1, 1852, 7th report	2,000.00
Oct. 1, 1852, 7th report	1,669.96
May 4, 1855, 9th report	3,000.00
Oct. 30, 1855, paid on principal, 10th report	4,340.00
Oct. 30, 1855, paid interest, 10th report	1,027.60

129 To this evidence the plaintiff objected on the ground of incompetency, immateriality and irrelevancy and the objection being by court overruled the plaintiff excepted.

The defendant next offered in evidence the papers and documents Exhibits 8, 9, 10, 11, 12, 13 and 14, and which are in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 8.

Statement of Note to Henry Anderson, 1st October, 1852.

1st July, 1841, note for	$20,000.00	
Int. to 1st Oct, 1852, 11 yrs. 3 mos. 6 per cent	13,500.00	$33,500.00
CR.		
1st June, 1848, 1-2 of a-c Coms. (11,934.97)	5,967.49	
Inst. to 1st Oct. 52, 4 yrs. 4 mos.	1,551.42	
1st June, 1852, 1-2 of a-c (634.31)	312.15	
Inst. 4 mos	6.24	
	$7,837.30	
Less 1-2 of Coms. refunded on sales cancelled and inst.	312.24	7,525.06
1st Oct. 1849, cash paid	$3,376.52	
Inst. to 1st Oct. 1852, 3 yrs	607.86	3,984.38
1st Oct. 1850, cash paid	$2,700.00	
Inst. to 1st Oct. 1852, 2 yrs	324.00	3,024.00

1st Oct. 1851, cash paid	$3,110.00	
Inst. to 1st Oct. 52 (1yr.)	186.60	
		3,296.60
		$17,830.04
Leaving due 1st October, 1852		$15,669.96

E. E.

CHARLES BUTLER.

W. GOODMAN,
Executor of H. Anderson, Deceased.

$1,669.96 NEW YORK, *Sept.* 27, 1852.

Received of Charles Butler sixteen hundred sixty-
130 nine 96-100 dollars on his note to H. Anderson, this 1st Oct. 1852.

W. GOODMAN,
Executor of H. Anderson, Deceased.

DEFENDANT'S EXHIBIT No. 9.

Received of Charles Butler, two thousand seven hundred dollars this 1st Oct. 1850, to be applied to his note due the estate of Henry Anderson.

P. ANDERSON, *Ex'r.*

City of New York, 1st Oct. 1850.

DEFENDANT'S EXHIBIT No. 10.

$3,376.52 NEW YORK, *6th Oct.* 1849

Received of Charles Butler, three thousand three hundred and seventy-six 52-100 dollars, which amount is to be credited and indorsed on the note of Charles Butler to Henry Anderson, dated 1st July, 1841.

W. GOODMAN,
Trustee and Ex. of H. Anderson, Dec'd.

DEFENDANT'S EXHIBIT No. 11.

HOLLY SPRINGS, *May 12th*, 1855.

Received of Charles Butler on the 20th April last three thousand dollars, which amount has been endorsed on his note of $20,000 due to the estate of H. Anderson, dec'd, as of that date.

W. GOODMAN,
Ex'r of H. Anderson, Dec'd.

DEFENDANT'S EXHIBIT No. 12.

Amount due 1st Oct. 1852,	$2,500.00
Amt. due 1st Oct. 1853,	4,000.00
Int. on $14,000 1 yr. to Oct. 1853,	840.00
	$7,340.00
Interest	90.10
	$7,430.10

7,340. dols. NEW YORK, *Oct.* 1, 1853.

For value received I promise to pay to the order of W. Goodman and P. Anderson, trustees and executors of the estate of Henry Anderson, deceased, seven thousand three hundred and forty dollars with interest on or before the first of December next and the payment of $7,340 as of 1st Oct., 1853, to be endorsed on my note due the estate of H. Anderson.

CHARLES BUTLER.
By S. H. FLEETWOOD, *His Att'y*

131 (Endorsed as follows:) Pay—— ——. Walter Goodman, P. Anderson, Exers. and Trustees of the estate of H. Anderson.

DEFENDANT'S EXHIBIT No. 13.

NEW YORK, *Sept.* 27, 1852.

Received from Charles Butler five thousand nine hundred and sixty seven 49-100 dollars ($5,967.49) on the 1st June, 1848, and also the sum of fifteen hundred and fifty-one 42-100 dollars ($1,551.42) for interest from 1st June, 1848, to 1st Oct. 1852, on the first named sum, making together $7,518.91, seven thousand five hundred and eighteen 91-100 dollars, to be credited on Charles Butler's note held by the executors of Henry Anderson, dated 1st July, 1841, for $20,000.

$5,967.49
1,551.42

$7,518.91.

W. GOODMAN.
Ex'r, &c., of H. Anderson, Dec'd.

NEW YORK, *Sept.* —, 1852.

Received from Charles Butler, Esq., two thousand dollars to be credited on his note held by the executors of Henry Anderson for $20,000, dated 1st July, 1841, as of the 1st October, 1851.

$2,000.

W. GOODMAN.
Ex'r, &c., of H. Anderson, Dec'd.

DEFENDANT'S EXHIBIT No. 14.

$2,172.70. MEMPHIS, TENN., *March 8th*, 1861.

Pay to the order of F. R. Farnsworth, Treas., twenty-one hundred seventy-two 70-100 dollars.

Value received and charge the same to the account of

JAMES H. ANDERSON.

To Chas. Butler, No. 12 Wall St., N. Y.

(Endorsed:) 744. Pay American Exch. Bnk. New York or order. F. R. Farnsworth, Treas."

(Stamped:) "Received payment. American Exchange Bank."

This evidence was objected to by the plaintiff on the ground of said papers being incompetent, irrelevant and immaterial, and to Exhibit No. 14 specifically upon the ground that no indica-
132 tion was given of its being a payment upon the debt embraced by the other evidence that had been adduced.

This objection was overruled by the court and the plaintiff excepted.

The defendant next offered in evidence the following letter, to-wit:

HOLLY SPRINGS, *March 19th*, 1860.

Charles Butler, Esq.

DEAR SIR: I duly received your letter in reference to your indebtedness to James H. Anderson or the estate of his deceased father. I have delayed a reply for the purpose of having an interview with James, who was at the time on his plantation. He is now here and does not seem indisposed to comply with your wishes, but thinks the mode of computing interest on payments not in accordance with law or usage. This I think will be the only difficulty in the way of the adjustment you desire.

Mr. Anderson's wife is now quite ill. It is his intention to start for New York with her as soon as she is able to travel and will then attend to the settlement with you in person.

I will have the accounts of the office made out as you desire, but may bring them up to the first of April instead of March, as you suggest.

I leave tomorrow for Washington City, and may visit New York before my return home.

Yours, &c.

W. GOODMAN."

To this letter the plaintiff objected on the ground of immateriality, incompetency and irrelevancy and upon the further ground that it was too vague and general in its terms to bind either of the parties hereto.

This objection was by the court overruled and the plaintiff excepted.

The defendant next offered in evidence the original contract between Charles Butler and Calvin Bronson dated February 18th, 1860, of which a certified copy had theretofore been offered and read in evidence, and which is heretofore set out in this bill of exceptions. The authenticity of said document was properly proven, and the plaintiff objected merely on the ground of incompetency, irrelevancy and immateriality.

This objection was by the court overruled and the plaintiff excepted.

The defendant next introduced in evidence a letter which is in the words and figures following, to-wit:

"PARIS, *4th May*, 1859.

"MY DEAR SIR: On my arrival in this city from Peau,
133 where we spent the winter, I received yours by which I was glad to hear your health is good, and that you are in a fair way to arrange your business.

I was a little disappointed that your letter contained nothing in relation to the debt you owe the estate of my brother. My last letter from James says that you have not written to him about it. "Now, says he," do not want to be hard on Mr. Butler, but I am determined to bring suit on the claim. Do you not think I am right?" I must state to you candidly that I thought he would be entirely right to bring suit without further delay, that the indebtedness has lasted a whole lifetime. I think you seem as little inclined now as twenty years ago, to hear of the matter in any way but as will serve your own interests. Why did you not make some answer to the letter in which I requested you to make some proposition that I might recommend to James to accept. Is it just or right to treat a lenient and friendly creditor with contempt? Is it consistent with justice to owe a debt and be in receipt of revenues from the mortgaged property without paying the interest of that debt?

I do not write this in anger, but only in sorrow and in justification on the advice I have given. I shall write to Mr. Goodman to prepare the papers and forward them to some lawyer in Toledo.

Mr. Goodman sent me statements of the Agency. The result has not come out as I thought, but I know of no objections that I can make. I am glad at the prospect of closing this long affair.

I hope I may be in New York this summer. I cannot but speak with uncertainty for my health continues feeble and that of Mrs. A. is not good.

I write by this mail to Wright acknowledging the dividends he placed to my credit and requesting him to make some inquiry about the pictures. I feel anxious about them. I have also written to Rome.

We see nothing here but the movements of troops; and the Emperor leaves for the army tomorrow. No battle of any importance has as yet taken place in Sardinia, but it is expected in about a week. The Austrians appear to have relinquished the intention of marching on Turin and will probably open battle on the line toward Genoa. There soon will be one hundred thousand troops in Sardinia.

The question is anxiously discussed what, if any, is the understanding between Russia and France. Some think it going the full extent of a redivision of Europe, if so, a general European war would ensue. England is evidently preparing for such a
134 conflict while her statesmen profess not to believe in it. To me it seems improbable, and we may hope that a few battles favorable to the French Army will result in peace. One can not find very convincing arguments to convict Napoleon of any further designs than the liberation of Italy. It would greatly strengthen his throne and add to his glory. I do not think he would imperil both by the insane attempt to extend his dominions to the Rhine and then around to Germany.

Yours truly,

P. ANDERSON.

P. S.—By this mail Mrs. A. writes a letter in your care for Mr. Wm. McMillan. Please retain it until you see Mr. McMillen who thinks of coming to Europe."

To this letter the plaintiff objected on the ground of incompetency, immateriality, and irrelevancy and the objection being by the court overruled the plaintiff excepted.

At this point counsel for the defendant moves the court to strike out and exclude from the jury the two letters from Charles Butler heretofore offered by the plaintiff, upon the ground that the same were written after the writer had contracted to sell the property involved herein to Calvin Bronson, and that a land owner can do nothing to depreciate or impeach the title of land which he has sold. The further reasons were urged of incompetency and irrelevancy and immateriality, and of such letters not having been brought home to the knowledge or notice of Calvin Bronson or any one claiming under him.

The motion to strike out was by the court overruled, to which the defendant excepted.

Thereupon the defendant rested, and renewed his motion to arrest the case from the jury and direct a verdict for defendant.

Thereupon the plaintiff likewise moved the court for an instruction to the jury to return a verdict for the plaintiff.

At this juncture the court excused the jury, and counsel for defendant specified as further grounds for the exclusion of the two letters of Charles Butler offered by the plaintiff and hereinbefore referred to, that the same referred to enclosures and that such enclosures were not offered in evidence, and that it was incompetent to offer a part only of either communication.

Thereupon counsel for plaintiff stated that the two letters referred to were offered in the plaintiff's behalf solely for the purpose of showing the actual date of the delivery of the deed to Charles Butler.

An adjournment (by consent of both parties) was had until Monday, December 10th, 1906.

135 On Monday, December 10th, 1906, the hearing of this cause was resumed, whereupon counsel for plaintiff objected to the introduction of any evidence at that stage of the proceeding by the defendant upon the ground that the case was closed several days previously; that it had proceeded to the argument stage and the argument had been practically concluded; that the defendant on the day of adjournment, namely, the Thursday preceding, had offered additional deeds; that for the purpose of examination by the plaintiff into those deeds and proceedings upon which they were founded, an adjournment was had until this day; that counsel for defendant had stated previously that no more evidence would be offered by the defendant. To this objection the court replied that the case was distinctly open for the purpose of the tax records.

The plaintiff renewed his insistence that no evidence at this time was competent, the case having been closed and no showing being made to indicate that the evidence then desired to be offered was recently discovered.

This insistence the court disallowed and overruled the objection, to which the plaintiff excepted.

Plaintiff thereupon, offered in evidence Exhibit D, D2 and D3 of Stipulation No. 1, which were in the words and figures following, to-wit:

"Exhibit D."

"Whereas Charles Butler, of the City of New York, did in July 1841, make and deliver to Henry Anderson, late of Holly Springs in the State of Mississippi, deceased, his promissory note in writing whereby for value received he promised to pay the said Henry Anderson on demand the sum of twenty thousand dollars with interest which said note and interest is now due and unpaid.

"And the said Charles Butler as a collateral security for the payment of the said note and interest caused to be assigned and delivered to the said Henry Anderson a certain bond and mortgage bearing date the 19th day of June, A. D. 1838, executed and delivered by Edward Bissell of the City of Toledo in the State of Ohio, to the said Charles Butler to secure the payment of ($21,500) twenty-one thousand five hundred dollars which said mortgage was a lien on certain town lots in the City of Toledo aforesaid therein named.

"Subsequently to the assignment of said mortgage to said Anderson and by virtue of the authority therein contained and in consequence of the failure of the mortgagor aforesaid to comply with the condition of said bond and mortgage at the request of the said Charles Butler it was foreclosed by a suit instituted in the
136 Court of Common Pleas of Lucas County, Ohio, in the name of said Henry Anderson as assignee as aforesaid in which suit a decree was obtained for the sale of the said Mortgaged premises. In conformity to the terms of the said decree the said mortgaged premises were sold on the 24th day of September, 1844, at public sale at Toledo by Edson Allen a Master Commissioner in Chancery and were bid off at said sale in the name of the said Henry Ander-

son for the aggregate sum of $6921; said sale was afterwards confirmed by the court granting the decree and a deed of the premises in due form thereupon executed and delivered to the said Henry Anderson which deed was recorded in the office of the Recorder of Lucas County aforesaid in Volume 10 of Deeds, pages 168, 169, 170 and 171.

"And whereas the said Henry Anderson held and intended to hold the title to the premises above referred to in trust to secure the payment of the note of the said Charles Butler, executed to him the said Anderson.

"The said Anderson having departed this life without declaring said trust in writing leaving him surviving his two sons, William Anderson and James H. Anderson his only heirs at law, the latter a minor the former of full age and the said William Anderson being desirous of carrying into effect the wishes and intentions of his deceased father has consented to execute and deliver to the said Charles Butler, this declaration of the terms and conditions on which he holds the title to the premises above referred to remaining unsold at the date hereof.

"*This* is to say, the following lots in the City of Toledo, viz: Lots 1008, 1009, 30, 31, 32, 33, 34, 1000, 1001, 18, 19, 20, 21 and Water Lots 992 all in the Vistula Division of Toledo as described in the Deed of the said Edson Allen, Master Commissioner to Henry Anderson, therefore,

"Be it known that I the above named William Anderson for and in consideration of the covenants and engagements of the said Charles Butler hereinafter contained do hereby acknowledge and declare that my interest in the above described premises as heir at law of the above named Henry Anderson, deceased, is held in trust as security for the payment of the above mentioned note of the said Charles Butler, together with the interest now due or to become due thereon, and for no other purpose whatever. Whenever the said note shall be fully paid and satisfied by the said Charles Butler as hereinafter provided, then I, the above named William Anderson for myself, my heirs, executors and administrators do hereby covenant and agree to and with the said Charles Butler his heirs
137 and assigns to execute and deliver to the said Charles Butler, his heirs or assigns at his or their request a full and complete release of all my right, title and interest in and to all or any part of the above described premises then remaining unsold and for which I may not have previously executed a release. The said William Anderson further agrees that in the event — the sale of a part or all of the above described premises at prices satisfactory to him or at such prices as shall be mutually agreed upon between him and the said Charles Butler to execute a full and ample release of his interest in the premises so sold on the condition that the purchase money so obtained be applied to the payment of the said indebtedness of the said Charles Butler.

"And the said Charles Butler, for himself, his heirs, executors and administrators doth hereby covenant and agree to and with the said William Anderson, his heirs and assigns that he will well and

truly pay to the executors of Henry Anderson the above mentioned note of twenty-thousand dollar , together with all interest due or to become due thereon in manner following, that is to say:

"At the date hereof the sum of $3,376.52 and on the first day of October, eighteen hundred and fifty, the further sum of fifteen hundred dollars, with all interest then due on the said note of $20,000. On the 1st day of October, 1851, the sum of $2,000. On the 1st of October, 1852, the sum of $2,500. On the 1st of October, 1853, the sum of $4000. On the 1st of October, 1854, the sum of $4,000.00. On the 1st of October, 1855, the sum of $6,000, together with all interest due on said note at the time of payment of these several installments.

"All taxes assessed or to be assessed on the above described premises are to be al-o paid by the said Charles Butler, whenever the same become due and payable.

"It is also understood and agreed that the amount which may hereafter be found due to the said Charles Butler from the estate of Henry Anderson, deceased, on the settlement between him and the executors of the said Anderson of the account between the said Butler and the said Anderson growing out of a contract between them in respect to commissions for warrantees of title of lands sold for the American Land Company in Mississippi shall and may be applied towards the payment of said note when the same shall be finally ascertained and adjusted between the parties interested therein, which amount added to the sum herein agreed to be paid at this date is supposed to be about equal to the amount of interest due on said note of Charles Butler on the 1st of July, 1849.

"The said Charles Butler further agrees that in the event
138 of the default of payment of any of the above named installments or of the interest due at the time said installments are payable for the term of ninety days after the same shall become due, then the whole debt remaining unpaid shall be deemed due and payable anything herein contained to the contrary notwithstanding.

In witness whereof the said William Anderson and Charles Butler have hereunto set their hands and seals this tenth day of October, 1849.

CHARLES BUTLER. [L. S.]
W. ANDERSON. [L. S.]

Sealed and delivered in presence of
S. H. FLEETWOOD.

"EXHIBIT D 2."

"Whereas, Charles Butler, of the city of New York, was indebted to Henry Anderson, of Holly Springs, in the state of Mississippi, in the sum of twenty thousand dollars for which said Butler gave his note dated 1st July, 1841, on which note a balance remains unpaid at this date. As security for the payment of said note said Butler assigned and delivered to the said Henry Anderson in his lifetime a certain bond and mortgage executed by Edward Bissell, of Toledo,

to him the said Charles Butler, which mortgage was on certain premises therein described situate in the said city of Toledo, and the same was afterwards foreclosed by proceedings in the Court of Common Pleas of the county of Lucas, state of Ohio, and the premises therein described were sold at public sale by the master commissioner appointed for that purpose by the said court, and were bid off in the name of said Henry Anderson to protect his security in said premises and a deed duly executed to him therefor, which said deed is dated the eighteenth day of November, eighteen hundred and forty-four, and was recorded in said Lucas county, in Vol. 10 of Deeds, pages 168, 169, 1770, 171, January 16, 1845, reference being thereto had—portions of which lots described in said deed have been heretofore in the lifetime of Henry Anderson sold and conveyed by said Butler under the authority and power of said Anderson, and the portions unsold and now held under said deed *is* described as follows, to-wit: Town lots in the Vistula Division of the city of Toledo, in the county of Lucas, state of Ohio, known and designated as lots 18, 19, 20, 21, 1008, 1009, 30, 31, 32, 33, 34, 1000, 1001, said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street. Also water lot No. 992, extending from Water street to the line of wharfing, and fronting on the Miami river one hundred and twenty-six 65-100 feet.

139 "And whereas the said Henry Anderson took and held the title to said mortgaged premises as security for the payment of the debt owing by said Butler to him as aforesaid, on the payment of which said premises were to be released and conveyed to the said Charles Butler or his representatives. The said Henry Anderson died in March, 1846, not having made or executed any declaration in writing for the purpose for which said property was held, and since the death of said Henry Anderson, the said Butler has made several payments of large sums of money on account of said debt to the estate of said Henry Anderson. And whereas James H. Anderson is the only child and heir at law of the said Henry Anderson, and is willing and desirous to execute a proper instrument or declaration in writing explanatory and declaratory of the facts aforesaid in respect to the said property and to carry into effect the intention of his father to the end that justice may be done. Therefore these presents witness that I, the said James H. Anderson, hereby acknowledge and declare that the said premises and every part thereof have been and are held as security for the payment of the balance which is due or which may at any time appear to be due on the said note or obligation from the said Charles Butler to the estate of said Henry Anderson, and for no other purpose or interest whatever, and on the payment of said note and interest the said premises shall and will be duly released and conveyed to the said Charles Butler, his heirs or assigns, and I, the said James H. Anderson, do hereby stipulate and covenant with the said Charles Butler, his heirs and assigns, that upon the request of said Butler his heirs or assigns I will execute, acknowledge and deliver any other or further assurance in the premises so that the lots of land afore-

said shall be held subject to the payment of the principal and interest of the aforesaid debt and for no other purpose.

In witness whereof I have hereunto set my hand and seal this sixteenth day of September, eighteen hundred and fifty-one.

[SEAL.] JAS. H. ANDERSON.

Sealed and delivered in presence of—

W. GOODMAN.
S. H. FLEETWOOD
P. ANDERSON.

STATE OF NEW YORK,
City and County of New York, ss:

On the sixteenth day of September, eighteen hundred and fifty-one, before me a commissioner for said state of New York, appointed by the governor of the state of Ohio, to take acknowledg-
140 ments of deeds and other instruments in writing to be used or recorded in said state of Ohio, personally came James H. Anderson to me known to be the person described and named in and who executed the within instrument, and acknowledged the signing and sealing of the same as his voluntary act.

In witness whereof I have hereunto subscribed my name and affixed my official seal.

[SEAL.] STANLEY H. FLEETWOOD,
Commissioner, &c.

"Memorandum between Charles Butler and James H. Anderson this 1st October, 1852, witnesseth that in consideration of the payment of the said note of the said Charles Butler to the executors of the said Henry Anderson as herein agreed the time for the payment thereof is hereby extended as follows, viz: The sum of twenty-five hundred dollars ($2,500) on the date hereof, the sum of $4,000 *dollars* on the 1st October, 1853, the sum of $4,000 on the 1st October, 1854, the sum of $4,000 on the 1st October, 1855, and the balance on the first day of October, 1856, with interest at 6 per cent. on the whole sum to be paid annually on the 1st October in each year and the said Charles Butler agrees to make the said payments as aforesaid and this agreement is to be taken in connection with and supplemental to the agreement of the parties hereto appended dated 16th September, 1851.

Witness our hands and seals this 1st October, 1852.

[SEAL.] JAMES H. ANDERSON.
[SEAL.] CHARLES BUTLER.

Witness:

S. H. FLEETWOOD.
W. GOODMAN.

"STATE OF NEW YORK,
City and County of New York, ss:

On this first day of October, eighteen hundred and fifty-two before me a commissioner for said appointed by the governor of the state of Ohio, to take acknowledgments of deeds and other instruments to be recorded in said state of Ohio, personally came James H. Anderson and Charles Butler, to me known to be the grantors described in and who executed the within instrument and severally acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed.

In witness whereof, I have hereunto subscribed my name and affixed my official seal.

[SEAL.] STANLEY H. FLEETWOOD,
Commissioner for Ohio, in New York.

"EXHIBIT D 3."

(Which said exhibit, being deed from James H. Ander-
141 son to Charles Butler of date April 7th, 1860, had been previously offered by the defendant in this case, and appears elsewhere in this record.)

Plaintiff states that these documents were offered in evidence for the sole purpose of showing that the relation of mortgagor and mortgagee existed between Charles Butler and William Anderson up to the time of the latter's death and between Charles Butler and James H. Anderson up to the date of Exhibit D 3, and had expressly obligated himself to pay the taxes.

The plaintiff next offered in evidence the letter from Charles Butler to James H. Anderson, dated July 28th, 1858, and another letter from Charles Butler to W. Goodman, dated March 19th, 1860, which letters are in the words and figures following, to-wit:

"NEW YORK, 28*th July*, 1858.

"J. H. Anderson, Esq.,
No. 12 Wall Street.

MY DEAR SIR: On my return from the west I found your letter of the —— ult. I had received your previous letter and delayed replying to it till I had been at Toledo, where I expected to go the last of May, and had seen the property. I was prevented going there till the last of June or rather the beginning of July and now hasten to reply to your letter.

The only possible means that I can command for the payment of the balance due to you is in the property at Toledo, and my object was to see if I could make any disposition of the whole or portions of it for that purpose now, or in a short time. I had a negotiation with a party there for the sale of the ¼ part of the property mortgaged to you for $10,000 and this negotiation is yet pending. The lot which he proposed to buy for the erection of a large tobacco manufactory was 82½ feet front on Summit street by 250 feet deep on Cherry street, and to pay $2,000 cash between this and first of

December, and the balance on bond and mortgage in annual payments with interest — 7 per cent. One great object was to get this improvement on the property and I yet hope to effect a sale to him on some terms.

There are about $2,000 of taxes and assessments against the property, overdue since last fall, which it has been utterly out of my power to provide for. There was no way under the sun that I could command the means. My losses of the failure of the railroad company were so enormous as to divest me of all available means of every kind for the time being and till I can by some means extricate myself. I propose now to go to Toledo in September
142 to sell lots and provide for the payment of the taxes on this and other property there in the same condition in respect to taxes, and if it is a possible thing to raise the means to pay off a portion or the whole of your debt by sales of property there over and above the taxes, I shall most certainly do it. I have other lots there and my purpose is to offer them all or any and from the records of any to make a payment to you. You should not, however, rely on this for any cash payment you have to make. It would not be safe to do so on any account. If it should meet your views to take the property at a bona fide valuation in payment of the debt it would be a great relief to me, and from such valuation would make a liberal deduction. I have struggled to hold on to this property for many years in the hope of realizing from it some part of the large sum it has cost me, and for the first time in many years it looks to me as the tome is approaching when it would be in demand at prices that would pay off the incumbrance and yield a handsome surplus.

"Some years ago I agreed with the Bethel Seamens Church Society at Toledo to give them a lot out of this property for a church erection. They went on and have erected a handsome brick edifice and now occupy it, and having complied with the condition of the grant they want a deed, which it is proper they should have. The erection of this church has added to the value of the property and moreover has relieved from some burden of taxes. I send you a rough plan or map of the property included in the mortgage to you and have marked on it the church lot and also the lot proposed to be sold to Mr. C. Bronson for $10,000 as stated herein. I have explained all this to Mr. Goodman, who is now here. I regret most sincerely the turn things have taken with me within the last year and most of all because it interfered with and defeated the provision and arrangements which I had made for the payment of this debt in full prior to the 1st January last. But the catastrophe which happened and which put all in the world I had in jeopardy was not foreseen, and could not be prevented, nor the consequences which have followed.

In haste, truly yours,

(Signed) CHARLES BUTLER.

"NEW YORK, *19th March*, 1860.

"W. Goodman, Esq., No. 12 Wall St., Holly Springs, Miss.

MY DEAR SIR: I have just been to the Manhattan Bank to see

if I could find the deed deposited there by you on the 9th
143 October, 1855 of the Toledo property and found it all safe.

It was left with Mr. Allaire the first teller and the envelope has the endorsement "The property of Walter Goodman, Peter Anderson, and to be delivered on the order of either of them." My contract with Mr. Bronson for the sale of the property is very stringent and requires me to make a title to the property with certificate of Mr. Waite that the title is free and clear and valid and to have the deed with the certificate of title at Toledo by the first of May. I am apprehensive that Mr. Bronson will avail of any possible chance of backing out from his contract with me. He is a perfectly responsible man, and once bound will pay for the property punctually according to his agreement, and hence it is of the first importance to me to be ready in ample time, to meet any difficulty which he may interpose. My agent Mr. Berdan has just been here and he has been overhauling all back taxes and I see nothing in the way of a clean title on receiving the deed from you. On the record the title is in Henry Anderson. The deed from the Trustees and Executors of Henry Anderson to me, and my warranty deed to Mr. Bronson makes a perfect chain going back more than twenty-two years, possession has been held during all that time by me, and the taxes have been paid by me. I shall want your order on Mr. C. O. Halstead, Prest. of the Manhattan Bank for delivery of the package containing the deed to me and if you please you may direct him to open it and to hand the deed itself to me, and take from me a receipt for it and my stipulation to return in place of it the cash payment of $2000 to be paid by Mr. Bronson on delivery of deed, as soon as received, and also to deliver the bond and mortgage of Mr. Bronson for $15,500 for the balance of purchase to him to take the place of the deed. You will see and appreciate the importance of placing me in a position to send forward the title papers to Mr. Waite at Toledo at the earliest possible moment, that he may be fully prepared to deliver the deed with the evidence of title before the first of May and may anticipate and be prepared to obviate any exceptions which Mr. Bronson may be prompted to take to the title.

I have no doubt that he will be very glad to avail of the slightest pretext to get rid of the contract. I will have the business done with perfect security to you and trust that you will give to it your immediate attention.

In haste, truly yours,

(Signed) CHARLES BUTLER."

The plaintiff stated that said letters were offered for the purpose of showing that the duty devolved upon Charles Butler as a result of his own obligation and undertaking to pay the taxes upon
144 the property involved in this litigation and that he had theretofore paid taxes pursuant to such obligation and undertaking, and for the further purpose of showing that Butler claimed to have been in possession of the property for a period of 20 years prior to 1860 and had paid the taxes during that interval, and for the further purpose of showing that James H. Anderson and Wil-

liam Anderson and the representatives of the estate of Henry Anderson were by those letters induced to refrain from paying the taxes themselves and induced to allow the same to become delinquent and in default.

To this evidence the defendant objected on the grounds of incompetency, irrelevancy and immateriality, which objection was by the court overruled and the defendant excepted.

Plaintiff then offered in evidence, after proving the authenticity of same, the financial report of the treasurer of the City of Toledo for the year 1847, which is in the words and figures following, to-wit:

Report of Treasurer of City of Toledo.

C. S. Whitney in acc't. with the City of Toledo.

1847 Dr.		1847	Cr.
March 22.		Feb'y 7.	
Vistula Grade, collected on tax.		Redeemed Warrants to date	$26,500.63
Duplicate 1847...	$26,771.84		
		My fees on amount collected 1847 ...	$231.17
		Balance in Treas. belonging to Vis. G.	$40.84
			$26,771.84

C. S. WHITNEY,
Treasurer.

The foregoing is taken from the Treas.'s original report of 1847 which report also contains a statement of the other taxes for said year 1847.

46.

This evidence was objected to by counsel for defendant and the court overruled said objection and defendant excepted.

Thereupon the plaintiff announced his case closed.

The defendant offered in evidence the following letters:

First: Charles Butler to Walter Goodman dated June 15th, 1848.

Second: Charles Butler to Walter Goodman dated February 9th, 1849.

Third: Charles Butler to P. Anderson dated February 23rd, 1849.

Fourth: Charles Butler to W. Goodman, dated April 10th, 1849.

145 Said letters are in the words and figures following, to-wit:

No. 12.

NEW YORK, 15*th June*, 1848.

W. Goodman, Esq.

DEAR SIR: Mr. Peter Anderson when here handed me the statement of Butler and Anderson's Commission account, showing that on the 1st June 1848, there was due to them the sum of ——— $11,934.97. Also the statement of Butler and Anderson's Commission account showing a balance due them on same day of $571.83. Presuming that their accounts are correct the aggregate amount is $12,446.80 one half of which sum belongs to me and you will credit the same at the proper time viz; $6,223.48, on my note to Henry Anderson dated 1st July, 1841, for $20,000 the indorsement to be made as of 1st June 1848. These accounts have been submitted to and passed upon by the auditor of the American Land Company an- by the shareholders at their annual meeting and no question it seems to me can ever arise upon them. Mr. Anderson left on the 13th inst. for White Sulphur Springs. A letter from you for him was received that day and sent to his lodgings in time. He was very well.

I hope your collections will enable you to send us some money. We have been disappointed in our collections by the loss of the Le Roy and Lake & Co. Bills. Our large dividends have taken all our funds.

In haste, dear Sir,

Truly yours,

CHARLES BUTLER.

47.

No. 20.

(Private.)

NEW YORK, 9*th Feb.* 1849.

W. Goodman, Esq., Holly Springs, Miss.

MY DEAR SIR: I send you herewith a statement of the property at Toledo held by the estate of Henry Anderson as security for the payment of my note to H. Anderson for $20,000. A few days since I forwarded you a detailed statement of the property at Chicago mortgaged as collateral security for payment of same debt in part. Referring to that letter you will see that the value placed on the property embraced in that mortgage sold and unsold at date was $50,000 that the amount of debt for which the same was mortgaged was exclusive of interest $2147 leaving the balance of principal due on the second class the first class having been paid off in part by the proceeds of the mortgage property and in part by other means which I have applied. If the value of the property was $52,675. it would be exactly 2½ dollars of security to $1 of debt, and for this purpose it may be so estimated and would

146

not I think vary much if any from the actual results. This gives to H. Anderson for his pro rata share of security, on dividing it with the other parties, for his $4582 of principal $11,455 say $11500 in value of the property as his separate security. If the property be valued at a lower rate, still he would be entitled to the same relative proportion in value as $4582 is to $21,470. To facilitate sales of the property and to facilitate the payment of my debts it is important to me to have the trust mortgage discharged and cancelled of record and give to each a security on specific portions of the property and to this arrangement I ask you and Mr. Anderson's consent with the assurance that in making the partition you may have to the extent of your share a choice of the lots to be taken. The valuation and division are intended to be fairly made so as to give to each his fair share, quantity and quality considered, and parties here will be satisfied with their pro rata share of any portion of it. I propose Ogden and Jones shall make a programme of the division with the valuations attached to each lot, and then submit it to the parties. This arrangement being perfected will enable me to place the security for my debt in more satisfactory shape. I wish to premise by the way that there has certainly been a misapprehension on your part and Mr. Anderson's in regard to payments to be made by me which I was careful to present, so far as explicit statements could present it, if you supposed or expected of me to make any payment in money on the first day of Oct., 1848. On the contrary I stated uniformly in very personal interviews with you, with Mr. Anderson and in my letters on that subject that it was not within my power to begin to make any payments on my debt to Mr. Anderson until after Oct., 1848; that up to that date I had as much to pay as I could possibly accomplish. I stated that after 1st Oct. there should be no further accumulation of interest on the debt, my plan being this year to take hold of it and begin to reduce it. I did not go into details with you or Mr. Anderson because it was unnecessary and you were satisfied with my assurance. If my debt to you had been the only one on hand it would long since have been reduced if not paid off, but with similar incumbrances to a very large amount pressing on me and with my means tied up exclusively in unproductive real estate at Chicago, Toledo and wild land's and Land Co. stock it was fruitless to undertake to do what in the nature of things was and is physically impossible. I
147 have applied every dollar of my earnings over and above a moderate living for the last ten years towards the payment of taxes, interest and debts, and have worked hard and constantly during that time as you well know. My ability rests after all not so much on property as upon earnings. A resort to the property, it being of the character and in the localities that it is, by forced selling of it would only secure the realization of a small sum comparatively, involve great sacrifice, and leave a large deficiency, which the prospects of earnings would not make up, while on the other hand the property if held and properly managed and converted according to my plans is a most important security, and

under the improved condition of the country furnishes annual contributions to an encouraging amount. Besides the debt to the Albany City Bank and the debts specified in the Trust Mortgage above enumerated I owe several other large sums (real estate debts of '36) of a similar character all of which are pressing upon me and on which I have to make payments as my means will allow. I have been carefully investigating and analyzing all these things and adjusting the ways and means so far as it is possible to do so for all human affairs are subject to contingencies and make the following proposal for the adjustment of the debt with you which I think I can effect and which I hope will be accepted, though it may not be all that you expected nor all even that you have a right to demand. If it falls short I beg that you will do me the justice to refer it to the proper causes.

My note dated 1st July, 1841		$20,000.00
Add interest from date to 1st July, 1849,		
8 years at 6 per cent is	$9,600.00	
Deduct the amount due me on Commission		
A-c	6,223.48	
		3,376.52
Amount due 1st July, 1849		$23,376.52

(Any additional amount due me on Commission a-c to be deducted from the amount of $3,376.52.)

On the first day of July, 1849 or between that day and the first day of August, 1849, I will pay in case $3,376.52 the balance of $20,000 to be secured by a separate mortgage for $6,000 on property at Chicago to be taken from the property embraced in the trust mortgage to B. F. B., as proposed above, and the property at Toledo to be held for the remainder $14,000 and interest. The interest and 6 per cent upon the whole principal from and after the first day of July 1849, to be paid annually on the first day of July in each year, and
148 $1,500 of principal to be paid annually on the first day of July or October in each year for four years, and the entire balance ($14,000) of principal to be paid in four equal annual installments thereafter being $3,500 per annum of principal. Mortgage on the Chicago property to be first paid by the application of the $1,500 of principal per annum. This will make the payments as follows:

July 1849 first payment		$3,376.52
July 1850 1 yrs. interest	$1,200.	
Installment	1,500.	
		2,700.00
July 1851 1 yrs. interest	1,110.	
Installment	1,500.	
		2,610.00 a-c

On making the payment of $3,376.52 the Executors to give me a proper Declaration that they hold the title to the Toledo property in Trust as collateral security for the debt. By this arrangement the principal will be paid off in 8 years making an average annual payment of $2,500 of principal besides the interest which during the period of payment will amount to averages of $800 per annum for the whole time. As sales are made of any portion of the mortgaged property the same to be released from the mortgage on my paying and accounting to you for the whole purchase money and securities received therefor; this stipulation is important to enable me to effect sales without embarrassment and will I trust be readily agreed to. The map and accompanying statement exhibiting the Toledo property which I send herewith will make all that plain and together with what I have heretofore sent you relative to the Chicago property will enable you to understand the whole subject and act intelligently. Any further information wanted I shall be happy to give. I do not myself think of any thing more at this moment. I am, dear sir,

Truly yours,

CHARLES BUTLER.

Also the following memorandum, which is a part of said letter:

Memorandum of the Property at Toledo Held by Henry Anderson as Collateral Security for the Payment of Charles Butler's Note for $20,000.

All the lots embraced in the mortgage of Edward Bissell to Charles Butler and by the latter assigned to Mr. Anderson as security are colored on the map, the lots colored blue represent the lots which I sold and converted in making improvements and have been conveyed. The property colored red is the property now held by Mr. Anderson. On water Lot 992 I have erected a warehouse which was rented by me in 1846 at $1,000 per annum and
149 the taxes on it; it was re-let by the party for a term of 3 years, ending April 10, 1849 for $1,250 without authority and I claimed and he finally compromised by his relinquishing the lease to me for the consideration of $250, so that I realized $1,000, for the first year and $1,250, for the 2d and 3d year, less insurance and repairs, amounting altogether to more than $125. per annum. I have offered to lease it the next year for $1,000, and taxes, I am now making some necessary alterations and repairs to the building to make it tenantable, at a cost of 3 to $500. The water line came up to a point just half way between Water street and Summit street covering nearly the whole of lots 1001 and 1000, see map; this hole had to be filled up, with earth. It has cost me about 3,000 Dolls, to do it, paying from 8 to 12 cents per Cubic yard for earth, and it is just finished. Without this the lots were worthless. The warehouse Improvement has cost me upwards of 5,000 dollars.

I have erected on the front of lot No. 1,000, at the corner of Water street and Cherry (opposite the Warehouse) two frame buildings for

stores at a cost of 1,200 Dollars. They are just finished and expect to rent them in the Spring at a moderate rent. The object is to bring business to this point for the same reason I subscribed $2,000 Dolls. in the stock of a plank road, and have paid $1,200 on my subscription, to be made, commencing on Water street, at the foot of Cherry street (opposite my warehouse) and running on Cherry street into the country. I am to pay 800 Dolls. more in July, 1849. This was the least I could do to secure the Terminus of it there, and the object was important to the property.

By these efforts I hope to make this property (which has cost me, altogether, nearly if not fully fifty thousand dollars adding taxes, simple interest and expenses to this date) valuable if the town grows into any importance. Its progress thus far has been slow. The front on Cherry street and Water street will be the most valuable. The map exhibits the dimensions of the lots. Without the outlay and improvements which I have made the property at this day would be of very little value, certainly not to exceed 6 or 8,000 Dolls. altogether. I now regard it as worth in the neighborhood of $20,000 including the improvements put on it by me. The annual taxes are heavy.

48.

No. 21.

NEW YORK, 23*rd Feb.*, 1849.

P. Anderson, Esq.

MY DEAR SIR—Prior to the receipt of your letter a few
150 days since of 3d of Feb. I had written to Mr. Goodman very fully on the subject of my debt to your brother's estate and transmitted a proposal for the liquidation of it which I doubt not has been received and will I hope be satisfactory. I refer you to that communication and the consideration therein presented. I shall be able to meet the payments as proposed in that letter if my life is spared and I would like to know whether I can apply that or any other sums which I may be able to command on your brother's note to the Trustees of the American Land Co. Such an application may enable me to make my payments with greater convenience and facility to myself and perhaps to a greater amount. Mr. Goodman said when here that such application might be made and would be entirely satisfactory to him. It is not a pleasant subject of retrospect the one of present duty, and I need no promptings on this score. In the review I do not see how I could have hastened the settlement of this matter. The simple fact is that it has grown out of an unwise implication made in the summer of 1836 now 13 years next summer for a faithless and unprincipled man, and from that day to the present it has been in one way or another the thorn in my side which has been a source of more mischief, injury and loss than all other things of a business nature put together. I have been laboring to overcome it ever since and all things considered I think with better success than I had reason to calculate on a few years back.

I propose now, you will perceive, to make a large payment in

July and to place the balance on specific security in more convenient sums for payment. I hope that you will give your sanction and co-operation to this arrangement which may be consummated at any moment so far as the preparation of the papers are concerned and against the cash payment in July.

The aspect of business at the south for the present season has changed entirely within the last 30 days as you will see by the papers. The advance in cotton and the general improvement in business of all kinds in England in connection with the California gold fever in this country, have together produced an impression altogether favorable to the trade and prospects of the country. I witness a great change around me and our best men are sanguine of the future.

We have had a severe and trying winter. Personally I have been afflicted to an unusual degree with influenza which has dis-
151 qualified me at times for any business and from the effects of which I am not recovering. I have had no spirit except a slothful and impatient one to give very much attention to anything for some time past. I propose to take up all your letters and supply the deficiencies if they exist.

I write on other matters to Mr. Goodman. Give my cordial respects to Mrs. Anderson and to William if he be with you.

Faithfully your friend.

CHARLES BUTLER.

No. 22.

49.

NEW YORK, 10*th April*, 1849.

W. Goodman, Esq., Holly Springs.

MY DEAR SIR: Your letter of the 30th March was received yesterday and I was gratified to receive it. I had deferred acknowledging the receipt of a letter from Mr. P. Anderson on the same subject received some ten days since because he stated that you were then absent and that on your return he would confer with you and write again. I regret that there should have been ground for the slightest misunderstanding in regard to the time when I should resume payments of my debt to Mr. Anderson's estate, and have no question that you were honestly under the impression as you state that it was to have been on the first of Oct. last. A reference to my letters on the subject will satisfy you that I was under a different impression indeed my engagements had all been so arranged that I could not until after that date and during the year following make any payments. In my letters and accompanying statements you will perceive that I proposed to make a payment in July, the amount of which is stated and which I shall expect to make if my life is spared. I have cast the interest at 6 per cent. You are of right entitled to 7—the rate is a matter of convention between us. I have fixed it in reference to my ability and the means I look to depend on for payments, but I do not insist, nor have I any right to take any such po-

sition, that you adopt my standard. In regard to this you will be governed by your own mind of what is not only right but which is also expedient and equitable as I had the money in Miss. and paid the exchange to bring it here, besides heavy damages for non-payment. I expect to pay it here and as the money is worth more to you here than there, by an average of from 1 to 2 per cent, it seemed to me that 6 per cent would be about just in that view
152 of it, but then as I said before I was influenced rather by the consideration of ability, than by any other view of the matter, and you must do what you think is right on this point. If you insist on 7 you must allow exchange on the sums paid here.

In regard to the division of the security. I have not the slightest objection that the Toledo property should continue to be held for the whole sum, and the Chicago as collateral. What I want is simply to divide up the Chicago property, as far as it is capable of being divided, among the parties holding their lien upon it, so as to give to each his separate security pro rata, this protecting the security of each one to the full amount, and placing it in a better footing for each. This too will facilitate my settlement of the debts as you can readily see as I do not wish to lessen the security in the slightest, on the contrary all my efforts have been directed to the improvement of it. It is proper that the amount due me on the commission account should be applied to the reduction of the debt as far as it will go. That has always been the intention and I conceive no question can or will arise in regard to it, yet I will enter into a proper stipulation with you to refund and account for any sum that should for any cause be hereafter deducted, in other words, to keep that payment good. The annual payments which I propose may and it is to be hoped will be larger but I could not now continue to put them at larger sums per annum looking to my property and business, and the proposal in this respect does look to a safe liquidation. It would be out of my power to make any payment sooner than July, now 90 days off, and if you wish me to fix a day I should not place it earlier than the 15th of that month. I hope that it may be so that you will come north in the summer and arrange the business with me, and I shall expect to see Mr. Anderson also. I received a note from him a day or two since stating that he was suddenly called to South Carolina to attend William's sick bed, and my apprehensions are excited for him from the tone of his note. I do sincerely sympathize with him in the prospect of such an afflicting event as that which seems to human appearance to be before him, and can not think of it without feeling of the deepest regret that one so young and so well endowed by nature and by education should be so early cut down—as the flower that springeth up in the morning in the evening it is cut down and withereth.

I am, dear sir, cordially yours,

153 CHARLES BUTLER.

The same were objected to by plaintiff upon the ground of incompetency, irrelevancy and immateriality, which objection was by the court overruled and plaintiff excepted.

Defendant then offered in evidence the following agreement between Charles Butler and Henry Anderson, to-wit:

"EXHIBIT G."

"This agreement, between Charles Butler of the one part and Henry Anderson of the other part, witnesseth:

"Whereas, the trustees of the American Land Company did by contract with the said Henry bind themselves to pay to the said Henry as compensation for the risk of executing warrantees for lands the sum of five per cent. on Indian reservations and two and one-half per cent. for all other lands held by said company and purchased by the said Henry as one of the agents of said company, which will appear reference being had to a contract dated 10th August, 1840.

"And whereas the said trustees have by resolution or agreement bound themselves to Charles Butler to compensate him for like risks in like manner for all the lands belonging to said company, and have resolved that warrantees made by the said Henry shall be considered as part performance by the said Charles under said resolutions.

"Now the said Henry agrees that the said Charles shall have one-half of the commissions agreed to be paid to the said Henry for such risk to be computed on all lands sold, and to be sold, after the said 10th August, 1840, on condition that the said Charles join with the said Henry in the said warrantees, taking one-half of the risks. And it is agreed that he shall in all things participate with the said Henry equally in his aforesaid contract with the trustees so far forth as sales thereafter to be made are therein provided for. And the said Charles agrees with the said Henry that he shall have one-half of the commissions agreed by resolution of the trustees to be paid to the said Charles for his risk as aforesaid to be computed on all lands sold or to be sold in the states of Mississippi and Arkansas on condition that the said Henry join with the said Charles in said warrantees taking one-half of the risk. And it is agreed that he shall in all things participate with the said Charles equally in all the benefits secured to him by the resolution or agreement of the trustees aforesaid so far as the lands aforesaid are concerned.

And it is mutually agreed that the commissions arising from the warrantees shall be set apart for the mutual indemnity of the
154 parties to this contract for losses that may arise on said warrantees the same shall be invested from time to time as conveniently may be on interest, and the interest shall be reinvested for the space of fifteen years and at the expiration of that time the same may be divided, but either party requiring it, shall be entitled to good and sufficient security to the amount of the sum divided and withdrawn by the other, to meet any loss on the warrantees that may arise to the amount so withdrawn.

And it is agreed that the said Henry shall invest the said commissions and he shall render yearly accounts to the said Charles of the sums arising from commissions and the mode of investment and the securities taken; and touching said securities he shall not be

responsible to the said Charles for the goodness thereof, but as to the time of investment he shall be bound to invest so soon as five hundred dollars shall arise or he shall be chargeable with interest thereon at the rate of 8 per cent. per annum. And in case of the death of the said Henry his representatives shall invest as aforesaid. And it is agreed that if the contract of the said Henry with the trustees or the resolution of the trustees with the said Charles be rescinded or impaired the consideration of this contract shall not be deemed to have failed.

Now in consideration of the foregoing agreement the said Charles hath and doth hereby bind himself to the said Henry to perform all and singular the stipulations on his part to be done and performed and the said Henry hath and doth hereby bind himself to the said Charles to do and perform all and singular the stipulations on his part to be done and performed according to the true intent and meaning of said agreement.

Done and executed this twenty-first day of September in the year A. D., 1841.

CHARLES BUTLER. [SEAL.]
HENRY ANDERSON. [SEAL.]

Said evidence was objected to by plaintiff upon the ground of incompetency, immateriality and irrelevancy, which objection was by the court overruled and the plaintiff excepted.

The foregoing is all of the evidence and testimony offered by both parties hereto and received by the court, upon the trial of this case.

Thereupon, the defendant moved the court to direct a verdict in his favor, and against the plaintiff.

Plaintiff likewise moved the court to direct a verdict in his favor and against the defendant.

Thereupon the court overruled said motion of plaintiff to direct said verdict for plaintiff, to which action plaintiff duly ex-
155 cepted.

Thereupon the court granted said motion of defendant to direct a verdict for defendant, to which action of the court, plaintiff duly excepted.

The court then charged the jury peremptorily to return a verdict in favor of the defendant, to which plaintiff then and there excepted.

And thereupon the jury returned into court their verdict, which was in favor of the defendant and against the plaintiff, as fully appears by the record in this case, upon which verdict judgment was by the court entered in this case against plaintiff, to all and each of which plaintiff duly excepted.

Thereupon, and within the time allowed by law, towit: on the 19th day of December, 1906, plaintiff moved in writing for a new trial on the several grounds set out in said motion. Whereupon, the court overruled the same, to which action of the court plaintiff then and there duly excepted.

Thereupon the plaintiff tendered this his bill of exceptions to the action of the court in the various particulars set out therein, in the

trial of this case, which bill of exceptions being examined and found correct, is allowed, signed in open court, sealed and made a part of the record in this cause on this 26th day of February, 1907.

ROBERT W. TAYLER,
Trial Judge.

(Endorsement:) O. K. Cary, Thimble, Thatcher, King & Tracy, C. W. Everett, O. B. Snider. Filed Feb. 26, 1907. Irvin Belford Clerk U. S. Circuit Court, N. D. O.

December Term, A. D., 1906. February 26, 1907.

Present: The Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL MESSINGER.

Now comes the plaintiff and presents to the court his certain bill of exceptions, to the action of the court, in the trial of this cause, which bill of exceptions being examined and found correct is allowed, signed in open court, sealed and made a part of the record in this cause.

156 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897. At Law.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Petition for Writ of Error.

Filed March 20, 1907. Irvin Belford, Clerk U. S. Circuit Court, N. D. O.

And now comes Peter Anderson, plaintiff herein, and says that at the December term, 1906, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf of the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of errors so complained of, and that a

transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

RHEA P. CARY,
C. A. THATCHER,
C. H. TRIMBLE,
Attorneys for Plaintiff.

Writ of error allowed as prayed, this 21st day of March, 1907.

R. W. TAYLER, *Judge.*

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Assignment of Errors.

Filed March 20, 1907. Irvin Belford, Clerk U. S. Circuit Court, N. D. O.

The plaintiff in this action, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred upon trial of this case, to-wit:

(*a*) The court erred in the rejection of evidence offered by the plaintiff upon said trial, in the following instances, to-wit:

(1) Rejecting the contract between Henry Anderson and Charles Butler, dated October 4, 1844.

(*b*) The court erred in the admission of evidence offered
157 by the defendant in the following instances, to-wit:

(1) Admitting copy of deed from Peter Anderson and Walter Goodman, trustees, to Charles Butler, dated October 1, 1855.

(2) Admitting copy of deed from Peter Lucas, executor of Henry Anderson, to Charles Butler, dated April 16, 1860.

(3) Admitting copy of deed from James H. Anderson to Charles Butler, dated April 7, 1860.

(4) Admitting copy of deed from Charles Butler and wife to Calvin Bronson, dated April 23, 1860.

(5) Admitting original deed, of which certified copy was also admitted from Charles Butler and wife to Calvin Bronson.

(6) Admitting copy of deed from Sidney Bissell and others to Charles Butler, dated February 22, 1843.

(7) Admitting Section 13, Stipulation No. 1, filed herein.

(8) Admitting Section 14, Stipulation No. 1, filed herein.

(9) Admitting Section 15, Stipulation No. 1, filed herein.

(10) Admitting copy of deed from the city clerk of Toledo, to Charles Butler, dated March 26, 1860, purporting to convey Lot 20, Vistula Division of Toledo.

(11) Admitting copy of deed from the city clerk of Toledo to

Charles Butler, dated March 26, 1860, purporting to convey Lot 30, Vistula Division of Toledo.

(12) Admitting copy of deed from the city clerk of Toledo to Charles Butler, dated March 26, 1860, purporting to convey Lot 31, Vistula Division of Toledo.

(13) Admitting copy of deed from the city clerk of Toledo to Charles Butler, dated March 26, 1860, purporting to convey Lot 32, Vistula Division of Toledo.

(14) Admitting copy of deed from the city clerk of Toledo to Charles Butler, dated March 26, 1860, purporting to convey Lot 33, Vistula Division of Toledo.

(15) Admitting copy of deed from the city clerk of Toledo to Charles Butler, dated March 26, 1860, purporting to convey Lot 1008, Vistula Division of Toledo.

(16) Admitting copy of deed from the city clerk of Toledo to Charles Butler, dated March 26, 1860, purporting to convey Lot 1009, Vistula Division of Toledo.

(17) Admitting copy of deed from the city clerk of Toledo to Charles Butler, dated March 26, 1860, purporting to convey Lot 1008½, Vistula Division of Toledo.

(18) Admitting certain books, documents, records, papers and files from the office of the city clerk of Toledo.

158 (19) Admitting copy of ordinance of the city of Toledo, passed March 4, 1841, marked "Exhibit A."

(20) Admitting copy of ordinance of the city of Toledo, passed October 23, 1841, marked "Exhibit B."

(21) Admitting record of resolution, passed February 4, 1843, marked "Exhibit C."

(22) Admitting record of ordinance, passed June 26, 1843, marked "Exhibit D."

(23) Admitting record of ordinance, passed November 7, 1843, marked "Exhibit E."

(24) Admitting record of resolution, passed December 23, 1847, marked "Exhibit F."

(25) Admitting record of proceedings of council of Toledo, January 10, 1843, marked "Exhibit G."

(26) Admitting original files council proceedings of Toledo, passed January 10, 1843, marked "Exhibit H."

(27) Admitting copy of oath of Allen and Scott, dated February 2, 1843, marked "Exhibit I."

(28) Admitting original affirmation of Smith, dated January 15, 1843, marked "Exhibit J."

(29) Admitting copy of notice of improvement, dated January 11, 1843, marked "Exhibit K."

(30) Admitting record of proceedings of council of Toledo, February 18, 1843, marked "Exhibit L."

(31) Admitting record of proceedings council of Toledo, May 10, 1843, marked "Exhibit M."

(32) Admitting original report, March 25, 1843, special committee to estimate expense, etc., of improvements and make assessment, marked "Exhibit N."

(33) Admitting record of adjourned meeting of council, March 20, 1843, marked "Exhibit O."

(34) Admitting record of proceedings of council, March 20, 1843, marked "Exhibit P."

(35) Admitting record of proceedings of council, April 4, 1843, marked "Exhibit P."

(36) Admitting record of proceedings of council, April 8, 1843, marked "Exhibit Q."

(37) Admitting record council proceedings, May 4, 1843, marked "Exhibit R."

(38) Admitting record report special committee and resolutions, May 15, 1843, marked "Exhibit S."

(39) Admitting tax duplicate 1843, marked "Exhibit T."

(40) Admitting tax record 1843, marked "Exhibit U."

(41) Admitting tax duplicate 1844, marked "Exhibit V."

(42) Admitting tax record 1843, marked "Exhibit W."

159 (43) Admitting tax duplicate 1845, two following pages, marked "Exhibit X."

(44) Admitting tax record 1845, marked "Exhibit Y."

(45) Admitting tax duplicate 1846, marked "Exhibit Z."

(46) Admitting tax record 1846, marked "Exhibit AA."

(47) Admitting tax duplicate 1847, marked "Exhibit BB."

(48) Admitting tax record 1847, marked "Exhibit CC."

(49) Admitting delinquent list of lots returned by treasurer for year 1846, marked "Exhibit DD."

(50) Admitting delinquent list dated October 1, 1847, marked "Exhibit DD continued."

(51) Admitting record list, sales, December 27, 1847, marked "Exhibit EE."

(52) Admitting the files in suit of Lot Clarke vs. The City of Toledo; the same being stipulation dated August 7, 1847; receipt dated November 15, 1845; journal entry and certificate showing proceedings August term, 1846; summons, dated December 27, 1841; endorsement on same and return journal entry October 12, 1846; order remanding at January term, 1846; certificate of Emerson, Clerk of Supreme Court.

(53) Docket entries in case of Lockport Bank & Trust Co. vs. The City of Toledo; Charles Butler vs. The City of Toledo.

(54) Admitting report of Charles W. Hill to the city of Toledo, in relation to special grade tax and the suit of Lot Clarke.

(*c*) The court erred in excluding evidence offered on behalf of plaintiff, in the following instance, to-wit:

(1) Section 9 of Stipulation No. 1.

(*d*) The court erred in admitting evidence offered by defendant, being letter dated Paris 4th May, 1859, signed, Peter Anderson.

(*e*) The court erred in admitting further testimony offered by the defendant after the defendant had rested his case.

(*f*) The court erred in admitting evidence offered by the defendant in the following instances, to-wit:

(1) Admitting copy of contract between Charles Butler and Calvin Bronson, dated February 16, 1860.

(2) Admitting sections 3, 4, 5 and 6 of stipulation No. 2.

(3) Admitting sections 4, 5, 6, 7 and 9 of stipulation No. 3.

(4) Admitting copy of probate journal No. 2, Lucas
160 County, Probate Records, dated April 20, 1860.

(5) Admitting Exhibit A of Stipulation No. 2.

(6) Admitting copy of annual account of the trustees of the estate of Henry Anderson, purporting to show payments by Charles Butler on note of Twenty Thousand Dollars, executed by Butler to Anderson.

(7) Admitting Exhibits 8, 9, 10, 11, 12, 13 and 14; the court erred in receiving each of said exhibits, separately.

(8) Admitting letter of Butler to Goodman, dated June 15, 1848.

(9) Admitting letter of Butler to Goodman February 9, 1849.

(10) Admitting letter of Butler to Anderson, dated February 23, 1849.

(11) Admitting letter Butler to Goodman, April 10, 1849.

(12) Admitting agreement between Charles Butler and Henry Anderson, marked "Exhibit G," dated September 21, 1841.

(*g*) The court erred in granting defendant's motion to direct a verdict for the defendant.

(*h*) The court erred in overruling plaintiff's motion to direct a verdict for plaintiff.

The ruling of the court set forth in assignments G and H was erroneous because, among other reasons,

(1) Butler was not in position to have acquired the tax title. He and those claiming under him were estopped to set it up.

(*a*) Because Charles Butler had expressly promised to pay the tax for which the lands were sold.

(*b*) He was in possession by express agreement with the life tenants and the executors, as mortgagee of the life estate, so that his acquisition of the tax title amounted merely to a payment of the tax and did not increase his own title and if it did, that title inured to the benefit of the life tenant and the remainderman.

(*c*) Butler and those claiming under him, although holding under deed purporting to convey the fee, could not set up adverse possession against the remaindermen, so as to invoke the statute of limitations.

(*d*) The life estate was not ipso facto forfeited to the remaindermen by allowing lands to be sold for taxes under Section 2852, Bates Statutes of Ohio, for the reason that at the time of the sale and during the period allowed for redemption, the life tenants had not neglected to pay the taxes, nor were they in possession of the property, nor were they charged with the duty of paying taxes, nor of redeeming the same; the title at that time being in the executors as
161 trustees for both the life tenant and the remainderman.

(*e*) The remainderman or men at that time were not ascertained. The remainder provided for by the will being a contingent one and the person entitled to enter could not be known until the date of James Anderson's death.

(*f*) On the theory of a supposed forfeiture Peter Anderson had no right to enter until the date of James Anderson's death, and hence the statute of limitations could not run against him.

(*g*) In any event the life estate was not ipso facto forfeited to the remaindermen by allowing the lands to be sold for taxes, because the forfeited is for the benefit of the remaindermen and may be waived by him, and in the absence of proof to the contrary, will be presumed to be waived.

(2) The tax proceedings as to all of these lots were insufficient and invalid.

(*a*) They were unconstitutional. Art. VIII, Secs. 1 and 28, Constitution Ohio, 1802, and the sale thereunder amounted to taking property without due process of law, for the reason that the act under which said taxes were levied did not provide for the lot owner an opportunity to appear and be heard as to whether or not his property would be benefited by the improvements and the amount of such benefit and the amount of taxes to be levied.

(*b*) The special committee appointed to estimate the cost of the improvement and assess the lands were not sworn in accordance with the ordinances of the city of Toledo of March 4, 1841.

(*c*) It is not shown either by resolution appointing said committee or by its own report that the committee was composed of disinterested and judicious freeholders.

(*d*) The report of said committee fails to show that the assessment was made in proportion to benefits secured.

(*e*) The resolution appointing said commission merely directed them to assess lands "as required by law in the premises."

(*f*) The treasurer's financial report for 1847 filed November 2, 1847, shows that he had collected within about one hundred dollars of the entire assessment for that year, so that the levy was void because there was not sufficient taxes due thereunder to authorize the sale of this property.

(*g*) The certificates of purchase issued to Dorr, Hough and Hill, to whom the lots were struck off, are not produced nor is there any evidence of the assignment thereof or of the endorsements thereon. For this reason, the deeds to Charles Butler for these lots are void.

162 (*h*) The sale was conducted, if at all, under the statute of 1846, whereas it should have been conducted under the act of 1837.

(*i*) The ordinance of the city of Toledo of 1843 required the tax duplicate to be delivered on the first Monday in July, whereas the tax duplicate for 1847 was not delivered until November 1st.

(*j*) Assuming that the Act of 1846 applied, Section 19 thereof required such special assessment to be "entered upon the annual assessment roll or duplicate in separate columns opposite the lots which are specially assessed." This was not done. But the delinquent special assessments were put on separate pages and were not even on the tax roll.

(*k*) There was no law authorizing a sale in 1847, for taxes assessed in 1843. Judicial proceedings were necessary, but were not taken.

(*l*) Section 28 of the Acts of 1837 required real estate to be advertised and sold according to the state law. The state law in force from 1844 up to and beyond 1847 required delinquent sales to be ad-

vertised for four weeks between the third Monday in November and the first Monday in January. There is no record of any advertisement in conformity with this law.

(*m*) The lands in this case were sold in December, where the state law required the delinquent sale to be made on the second Monday in January next ensuing.

(*n*) No proof of a competent nature was offered of the advertisement in 1847, which was not an advertisement of a delinquent sale, but which was made under the supposition that the Act of 1846 was applicable. The newspaper containing the advertisement is the best proof and the certification of the clerk was insufficient even assuming that the advertisement claimed to have been made, was sufficient.

(*o*) The tax deeds are not evidence as to facts therein recited. The statute making such deeds prima facie evidence applies only to lands which had been forfeited and not to such a sale as this.

(*i*) The court erred in refusing to direct a verdict for the defendant as to lots 1008 and 1009. It indisputably appears from the record that but seven-eighths of these lots were sold at the sale, but deeds were made for the entire interest thereunder.

(*j*) The court erred in granting the motion of the defendant filed October 31, 1906, and allowing said defendant to withdraw clause number 9 of stipulation number 1, and in refusing to
163 allow the plaintiff to read said stipulation to the jury; the full substance of which clause is as follows:

"That Peter Anderson and Walter Goodman, of Holly Springs, Mississippi, two of the executors of the will and trustees of the estate of Henry Anderson, deceased, executed a deed purporting to convey to said Charles Butler, all the real estate involved in this action, which deed was duly signed, sealed, acknowledged and executed by said Peter Anderson and Walter Goodman as said executors and trustees according to the laws of the state of Ohio, in the presence of two witnesses, who signed as such and said deed was dated October 1st, 1855, but was not delivered until about the first of May, 1860, and was recorded on May 2nd, 1860, on page 110 of volume 34 of the record of deeds of Lucas county, Ohio; a copy of said deed is hereto attached and marked "Exhibit B" and hereby made a part hereof.

The foregoing statement as to delivery of said deed, shall not preclude defendant from offering proof as to facts which may establish a conditional or other earlier delivery of said instrument, subject however, to provisions of paragraph 18 hereof.

That said Peter Anderson was a brother of Henry Anderson, deceased, and is not the plaintiff, although having the same name."

The plaintiff prays that the judgment rendered herein may be reversed.

RHEA P. CARY,
C. H. TRIMBLE,
C. A. THATCHER,
Att'ys for Peter Anderson.

(Endorsement:) No. 1897. U. S. Circuit Court, Northern Dist. of Ohio, Western Division. Peter Anderson vs. Rosewell Messenger.

Petition for Writ of Error and Assignment of Errors. Filed, Mar. 20, 1907, Irvin Belford, Clerk U. S. Circuit Court, N. D. O.

In the Circuit Court of the United States, for the Northern District of Ohio, Western Division.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

To the Clerk of said Court:

In making record for Court of Appeals on writ of error, please make complete record to date of certification commencing with judgment on mandate, to-wit, September 11th, 1906. Also petition and answer.

C. H. TRIMBLE,
Att'y for Peter Anderson.

Dated, March 20th, 1907.

164 (Endorsement:) No. 1897. U. S. Circuit Court, Northern Dist. of Ohio, Western Division. Peter Anderson vs. Rosewell Messinger. Præcipe for Transcript. Filed, Mar. 20, 1907. Irvin Belford, Clerk, U. S. Circuit Court, N. D. O.

The United States Circuit Court of Appeals, for the Sixth Circuit.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States, To the Honorable Judge of the Circuit Court of the United States for the Northern District of Ohio, Western Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court, before you, or some of you, between Peter Anderson, plaintiff, and Rosewell E. Messinger, defendant, a manifest error hath happened, to the great damage of the said Peter Anderson, plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the sixth circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the 20th day of April, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 21st day of March, 1907, and in the year of the Independence of the United States of America.

Attest:

IRVIN BELFORD, *Clerk.*
By B. C. MILLER, *Deputy Clerk.*

Allowed this 21st day of March, 1907.

R. W. TAYLER, *Judge.*

Filed Mar 21, 1907. Irvin Belford, Clerk, U. S. Circuit Court, N. D. O.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit,
Northern District of Ohio, ss:

In pursuance of the command of the writ of error within, I, Irvin Belford, Clerk of the Circuit Court of the United States for
165 the Northern District, herewith transmit a true copy of so much of the record, bill of exceptions, assignment of errors and proceedings in this case of Peter Anderson vs. Rosewell E. Messinger, lately pending in the Circuit Court of the United States for the Northern District of Ohio, as I am requested by counsel, under my hand and seal of said court.

Witness my official signature, and the seal of said Circuit Court at the City of Toledo, in said District, this 10th day of April, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States of America the one hundred and thirty-first.

[SEAL.]

IRVIN BELFORD,
Clerk of the Circuit Court of the United States,
for the Northern District of Ohio.
By J. W. WILSON,
Deputy Clerk.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To Rosewell E. Messinger, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, Ohio, in said circuit, on the 20th day of April, next, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States, for the Northern District of Ohio, Western Division, wherein Peter Anderson is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 21st day of March, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States of America the one hundred and ——.

R. W. TAYLER,
U. S. District Judge.

We hereby, this — day of ——, 1907, accept due personal service of this citation on behalf of Rosewell E. Messinger, appellee.

—— ——,
—— ——,
Solicitors for Appellee.

Marshal's No. 2089.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

U. S. Marshal's Return.

Received this writ at Toledo, Ohio, March 25, 1907, and
166 on the same day and place, I served the same on the within named Rosewell E. Messenger, by delivering to him personally a true and certified copy hereof with all the endorsements thereon.

F. M. CHANDLER,
U. S. Marshal.
By A. F. OWENS, *Deputy.*

Fees:

Service	$2.00
Travel	.06
	$2.06

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

At Law.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Know all men by these presents, that we, Peter Anderson as principal, and American Bonding Company as sureties, are held and firmly bound unto the defendant, Rosewell E. Messinger, in the full and just sum of five hundred dollars to be paid to the said defendant, Rosewell E. Messinger, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and

severally by these presents. Sealed with our seals, and dated this 21st day of March, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a circuit court of the United States, for the Northern District of Ohio, Western Division, in a suit pending in said court, between Peter Anderson plaintiff and Rosewell E. Messinger, defendant, a judgment was rendered against the said Peter Anderson, and the said Peter Anderson having obtained a writ of error, and filed a copy thereof in the Clerk's Office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Rosewell E. Messinger, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said Circuit.

Now, the condition of the above obligation is such, that if the said Peter Anderson shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, *also* to remain in full force and virtue.

Sealed and delivered in presence of

PETER ANDERSON.
C. A. THATCHER, *His Attorney.*

167 [CORPORATE SEAL.] AMERICAN BONDING CO. OF BALTIMORE.
By FRED C. STRUTZ,
Its Attorney in Fact.

Approved by
R. W. TAYLER,
District Judge.

(Endorsement:) No. 1897. Peter Anderson, vs. Rosewell Messinger. Undertaking for Writ of Error. Filed March 21, 1907. Irvin Belford, Clerk, U. S. Circuit Court, N. D. O.

December Term, A. D. 1906, to wit, March 21, 1907.

Present: The Honorable Robert W. Tayler, U. S. District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

This 21st day of March, 1907, came the plaintiff, by his attorneys, and filed herein and presented to the court his petition, praying for the allowance of a writ of error an assignment of errors intended to be urged by him, praying also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States

Circuit Court of Appeals for the Sixth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiff giving bond according to law, in the sum of five hundred ($500.00) dollars.

Circuit Court of the United States, Northern District of Ohio, Western Division.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Irvin Belford, Clerk of the Circuit Court of the United States for said District, do hereby certify that the annexed and foregoing pages contain a full and true copy of so much of the record, bill of exceptions, assignment of errors, papers, exhibits and proceedings in the above entitled case as I am advised by counsel—as shown by the attached precipe for transcript and are necessary to the hearing in the circuit court of appeals; and there is annexed to and transmitted therewith the Writ of Error and Citation issued therein.

In Testimony Whereof, I have hereunto signed my name
168 and affixed the seal of the said court at Toledo, in said District, on this 10th day of April, A. D. 1907, and of the 131st year of the Independence of the United States of America.

[SEAL.] IRVIN BELFORD, *Clerk.*
By J. W. WILSON,
Deputy Clerk.

169 And afterwards towit on October 16, 1907, an entry was made upon the Journal of said Court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1679.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

This cause is argued by Mr. Rhea P. Cary for plaintiff in error and by Mr. Harry E. King for the defendant in error and is continued until tomorrow for further argument.

And afterwards towit on October 17. 1907. an entry was made upon the Journal of said Court in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

Before Lurton, Severens and Richards, C. JJ.

This cause is further argued by Mr. Harry E. King and
170 Mr. Clayton W. Everett for the defendant in error and by Mr. C. H. Trimble and Mr. C. A. Thatcher for the plaintiff in error and is submitted to the Court.

And afterwards towit on December 3. 1907. a judgment was entered in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1679.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

Error to the Circuit Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Ohio and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed with costs and the cause is remanded to the said Circuit Court with directions to
171 award a new trial.

And afterwards towit on December 17. 1907. an opinion was filed in said cause which reads and is as follows:

Opinion.

172 United States Circuit Court of Appeals, Sixth Circuit.

No. 1679.

PETER ANDERSON, Plaintiff in Error,
v.
ROSEWELL E. MESSINGER, Defendant in Error.

Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

Submitted October 17, 1907. Decided December 3, 1907.

Before Lurton, Severens and Richards, Circuit Judges.

This cause came here on a former writ of error, and upon attentive consideration of the record, we reversed the judgment of the court below. 146 Fed. 929. We did not direct the judgment to be entered in that court, as we might have done, but on account of certain incidental matters about which the record was not clear and which might properly affect the judgment which ought to be given, notably certain sales and deeds of the land on assessments for local improvements, we thought it expedient to order a new trial; and a mandate issued accordingly. A second trial has been had, this time before the court and a jury, with the result of a verdict for the defendant under the direction of the court and a judgment for that party. This case is again brought here by the plaintiff for review of the proceedings on that trial. The principal facts are fully stated in our former opinion and need not be now repeated at length. With the exception of those which relate to the assessment and sale of the land for a local improvement, the grading of a street in Toledo, and deeds issued thereon, the facts exhibited by this record
173 are in all essential particulars the same as those disclosed by the record at the former hearing. We have been invited by counsel for defendant to reconsider the question of the construction of Henry Anderson's will. We must decline to do this. The questions there decided are matters adjudged and have become the law of the case. When the former writ of error was disposed of the questions of law in the case were settled, and we have now no authority to redetermine them. This is the established doctrine which governs the federal courts and is quite generally accepted in other courts. This court has recognized and applied the rule in previous cases. Stoll v. Loving, 120 Fed. 805, and cases cited at page 806. Western Union Telegraph Co. v. City of Toledo, 121 Fed. 734. And see also Maguire v. Tyler, 17 Wall. 253, 284. Kingsbury v. Buckner, 134 U. S. 650, 670.

All the reasons and arguments which might have been urged at the hearing on the former writ of error against any conclusion then

made were by the effect of the decision, overruled. No doubt, if upon a new trial a substantially different state of facts is shown so that another question is presented, the former adjudication does not hold. But that is not the case here, except as above noted. With respect to our decision that the deeds of the executors and trustees of Henry Anderson to Charles Butler were not valid as against the remainder-man for the reason among others that they were not delivered during the continuance of the trust with which the executors were charged, a point which is now contested, we add that the conditions on which that decision was based were not altered on the new trial. In the stipulation respecting the facts, it was stated that the deeds were not delivered until about the 1st of May, 1860, at which time the executors were no longer trustees. After the cause had been remanded to the circuit court, upon application of the attorneys for the defendant stating that they were mistaken when they made that stipulation, and that the deeds were delivered at an earlier date, the court relieved the defendant from it. But the fact stated in the stipulation in that regard was clearly shown by the evidence in the case. And upon the new trial the
171 evidence that the fact was as stated, was so clear and uncontradicted that a finding to the contrary would have been wholly unauthorized. But as we shall see, the court did not find that the deeds in question were delivered earlier than about May 1, 1860.

It is contended by the defendant that the deeds from the trustees under the will to Butler were held in escrow by the Manhattan Bank to be delivered upon the payment by Butler of his debt. But to constitute an escrow there must be a contract which prevents the grantor from recalling the deed.

James v. Vanderheyden, 1 Paige 385.
Cook v. Brown, 34 N. H. 460.
Prutzman v. Baker, 30 Wis. 644.

There is no evidence in this record that anything more was done or intended than to leave the deeds with a depositary conveniently near to Butler, so that when he should pay his debt he could take the deeds. For aught that appears they could have been recalled at any time without the violation of any contract on the part of the trustees. To have prevented them there must have been some binding obligation. The self-serving statement by Butler that they were left at the bank in escrow is not evidence that such was the fact. And in his letter of March 19th, 1860, to one of the trustees asking for the delivery of the deed, he states that he has been to the bank and seen the deed, and that "the envelope has the indorsement 'the property of Walter Goodman, Peter Anderson, and to be delivered on the order of either of them.'"

At the conclusion of the evidence, both the plaintiff and the defendant requested the court to charge the jury peremptorily, each in his own favor. The court refused the request of the plaintiff and granted that of the defendant. We are required by the opinion of the supreme court in Beuttell v. Magone, 157 U. S. 154, to hold that these mutual requests were the equivalent of a withdrawal of

the facts from the jury and a submission of them for a finding by the court. And we must presume that the consequence must be the same as if there had been an original stipulation to try the case without a jury. In that case, where the court make only a
175 general finding, that finding must stand if there was any evidence on which the court could have properly found the facts necessary to support the judgment. But if, though the finding be general, it must necessarily rest upon a fact or facts, the finding of which was not warranted by any evidence in the case, a judgment based on such general finding would be erroneous. One of such facts in the present case would have been that the deeds were delivered at a time when the trustees were authorized to deliver them. The presiding judge did not file any written opinion and the bill of exceptions does not state the ground of his action. At the hearing we were supplied by counsel for the plaintiff with a copy of the stenographer's notes of the judge's statement of the ground on which his direction was given to the jury. Counsel for the defendant stated that they had also a copy, and no objection was made to the correctness of that furnished by counsel for the plaintiff. The opinion of the court below is not required to be made part of the record, and is sent up only to enable the appellate court to understand the grounds of its decision, and if its authenticity is shown, that is sufficient. In these circumstances we think we may properly refer to it. Having regard to our former decision, it must have been made to appear on the new trial either that the deeds of the trustees were delivered while they held the office of trustees, or that the plaintiff had been cut off by the assessment proceedings and the deeds to Butler founded thereon. It appears from the stenographer's notes that the court put its direction to the jury upon the sole ground that the plaintiff's action was barred by the statute of limitations, in that he had not asserted his right within ten years after he had become of age. He reached that conclusion upon the following line of reasoning: He conceded the general rule to be that statutes of limitation for actions in ejectment run only from the time when the right of entry accrues, and that in the case of one having an estate in remainder his right of entry accrues on the cessation of the preceding estate. But he referred to a status of Ohio which he thought operated in the case at bar to extinguish the life estate before its intended limit
176 and to accelerate the commencement of the estate in remainder. That statute was this:

"If any person who shall be seized of lands for life shall neglect to pay the taxes thereon, so long that such lands shall be sold for the payment of the taxes, and shall not, within one year after such sale redeem the sale, according to law, such person shall forfeit to the person or persons next entitled to such lands in remainder or reversion all the estate which he or she so neglecting as aforesaid, may have in said lands." Revised Stat. Ohio, Section 2852.

It has the rare quality that it proposes to punish the delinquent tax-payer by forfeiting his estate to another person. The supreme court of Ohio holds that this statute is valid, McMillan v. Robbins,

5 Ohio, 528, but that to have effect the sale must be a valid sale and that a void sale does not work a forfeiture. Estabrook v. Royon, 52 Ohio St. 318. And this seems a just conclusion if the statute is valid, for it would be an absurdity to punish a man for a neglect to do a thing which he is not legally obliged to do. That which is void is as if it did not exist. But if the sale is a valid sale the title is thereby forfeited to the purchaser. Or, to speak more precisely, such a sale cuts up by the root all previous titles and inaugurates a new and absolute title in the purchaser. As the preceding estate as well as the estate in remainder are cut off by the neglect to pay the taxes and the sale and deed therefor, there is nothing to forfeit, and the entire scheme is fruitless. But this discussion assumes that the statute in question, which is a part of legislation relating to the collection of general taxes, applies to assessments for local improvements. We think, however, it would be erroneous to admit this. And we shall premise what we have to say upon this subject by suggesting that the question is involved in the entire proceeding taken by the common council of the city for the assessment of the land in controversy for the projected street improvement; and, further, that if this particular provision of the statute is to be given any effect, it is for the forfeiture of the life estate and is penal and should therefore be given a strict construction. There is a well-known and well-established distinction
177 between general taxes and assessments for local improvements. The former are for the promotion of the general order and the welfare of the public organization. They are levied and collected under general laws which regulate the steps to be taken in detail, and with respect to the more important fix a definite time and place when and where they must be taken. Every citizen is required to take notice of such laws; and he is thereby provided with the means of knowing what is necessary for the protection of his property, and the time, place and manner of securing it. An assessment for a local improvement is a levy made upon the citizen or his property for the purpose of paying for an improvement in his neighborhood which enhances the value of his own property. It would be beyond the power of the government to compel any such tribute of one person for the single purpose of benefiting his own land; but when a number of owners composing a district of the public or owning land in the district which is benefited by the improvement, the power to specialize the district for such a purpose is recognized as falling within the analogy of the power to levy general taxes. It is a quasi public purpose. And the legislation is special. Under the general grant to municipalities of the power to tax, no authority to levy special taxes for particular improvements is included. There must be special authority, and provision must be made for safe-guarding the rights of those affected by its exercise, and further the exercise must be pursued in all essential particulars in accordance with the lines prescribed. The citizen is not now under the obligation of the general law nor directed by it how and when he is to protect himself against invasion of his private rights. As the power to levy tribute for such improvements is not conferred by a general grant but only by special grant, its exercise must con-

form therewith, and it is a reasonable rule, the proceeding being in invitum, that not only must the power conferred provide for the protection of individual rights, but that the provisions shall be strictly complied with. The grant may refer to and adopt provisions of the general law, and in such case the latter so far
178 as they extend, are to be read as part of the grant, but not otherwise or further. These propositions are believed to be well established, and the consequence is that if the special law fails to make the necessary provisions, or if provided, they are not followed, any proceedings thereunder are void. This distinction between general taxes and special assessments is universally recognized.

Cooley in his work on Taxation, p. 636 says "Though assessments are laid under the taxing law, and are in a certain sense taxes, yet they are a peculiar class of taxes, and not within the meaning of that term as it is usually employed in our constitutions and statutes:" citing many cases, among which are

Maloy v. Marietta, 11 Ohio St. 636.
Lima v. Cemetery Association, 42 Ohio St. 128.
Raymond v. Cleveland, 42 Ohio St. 522.

To which may be added
Reeves v. Wood County, 8 Ohio St. 333.
Chicago, etc. R. Co. v. Kieth, 67 Ohio St. 279.

And in the last case here cited, it was held that a statute which did not provide for a notice of hearing in a proceeding for levying a particular assessment was void. Judge Jackson, while circuit judge so held in Scott v. Toledo, 36 Fed. 385, and again in Murdock v. Cincinnati, 39 Fed. 891. The extent to which the land is benefited and therefore of the assessment to be levied upon the owner is of prime importance to him. An opportunity must therefore be provided for him to be heard before some tribunal having authority to determine it, upon the question of the extent of the benefit. The provisions of section 28 of the charter of the city of Toledo, Local Laws of 1837, do not provide for any such hearing. The only notice or hearing provided for by any part of the charter relating to this subject is one contained in section 28 which is this:

"The city council shall give notice in one of the newspapers published in said city or vicinity for six consecutive weeks of the improvement to be made, in order that any one damaged by reason of such improvement may file his claim in writing in the office of the city clerk within ten days after the expiration of said six
179 weeks' notice, and the said committee shall assess the damages, if any, of such claims and shall add the same to the cost of the improvement as a part of the expense so to be assessed as aforesaid, and said committee within twenty days after the time shall have expired for filing claims for damages, shall return to the office of the treasurer a report setting forth the estimated cost of such projected improvement, including the damages awarded by them, etc."

The damages here spoken of are such as the several parcels sustain by reason of the construction of the work. They are made part

of the general cost and expenses of the proceedings. They have no relation to the value of the benefits for which the several parcels are assessed.

The charter was amended by an act passed in 1846, Local Acts, p. 208, and by section 36 it was enacted that:

"The tenth, twenty-sixth, twenty-seventh, twenty-eighth and twenty-ninth sections of the act of 1837 are repealed, provided that all rights, titles, liabilities and remedies acquired or incurred or subsisting under and by the first mentioned act and the ordinances, resolutions and by-laws made in pursuance of the authority thereof, shall remain unaffected by the passage of this act and the repeal of said act of incorporation, and the ordinances, by-laws and resolutions aforesaid shall remain in force until the same are repealed by the council and the present officers of said city shall hold their respective offices until their successors are elected and qualified." Passed Feb. 27, 1846.

But the proceedings relative to the assessment had taken place as early as 1843, and it was put upon the roll of that year. For some reason the taxes and assessments on that roll were not collected. The assessments in question were put upon the roll of the year 1847, and, being unpaid, the lands were sold, and certificates thereof given. It appears that the proceedings for the assessment were taken in 1843 and therefore controlled by the act of 1837, and that the proceedings for the collection in pursuance of which the sale was made, and the sale itself took place in 1847. The deeds thereon were made in 1860. It is contended that the deeds were void, because the proceedings on which they rest in failing to afford an opportunity for hearing, disregarded a fundamental right, and we
180 are of opinion that for the reasons we have given it must be so held. Cooley on Taxation (2d Ed.) 655; Whiteford v. Probate Judge, 53 Mich. 130; Chicago, &c., R. Co. v. Keith, 67 O. St. 239; 25 Am. & Eng. Encl. of Law, 2d Ed., 1215. The fourteenth amendment to the Constitution in requiring due process of law formulated a principle of justice which had long been recognized. It applied to the legislation of the states an elementary principle which had been imbedded in the institutions of government from the time of Magna Charta that a man may not be disturbed in his rights of person or property, unless by due process of law, which always includes notice and opportunity to be heard. And it made complaints of the violation of this enactment justiciable by the courts of the United States. But before that time it was a principle in the fundamental law of the several states; and the federal courts in administering the law of the states were bound to recognize and enforce it.

Other reasons consisting in irregularities in the proceedings are urged by counsel for the conclusion that the deeds were void, but we will not prolong this discussion by considering them. We think that the court below was mistaken in supposing that under the law of Ohio the failure to pay these taxes resulted in a forfeiture of the life estate, and that the plaintiff's right to the possession accrued at a time prior to the death of James Anderson. All this is said, however, upon the assumption that section 2852 has application to an assessment for local improvements. But it is as we have said a

provision found in the statutes for general taxation, and the neglect to pay taxes which this section speaks of is the neglect to pay the taxes which the statute is here dealing with.

Besides, it seems clear that the person whose estate is to be forfeited must have been under an obligation to pay the taxes. But at the time when these assessments were made the life tenants under the will of Henry Anderson were not the owners, and owed no duty to pay these assessments.

But there is another reason springing from other facts which we think must lead to the same result. In 1843, when this assessment, if valid, should have been paid, Charles Butler was the owner of this land by virtue of the deed to him from Bissell in February of that year. He continued to be the owner until the date of the master's deed to Henry Anderson on November 18, 1844, and should have attended to the payment of the taxes and assessments levied upon the land in those years. The lands were bid off by Charles M. Dorr at the sale on December 27, 1847. On February 18, 1850, Butler sold these lands by contract to Bronson. March 25, 1850,

Butler obtained from the city clerk deeds which recite that
181 they were issued to Butler as assignee of the certificates of sale. He thus became the owner of a title which had its origin in his own default. By this contract with Henry Anderson of October 4, 1844, the latter was to take title to this land upon the sale which had been made to him by the master in the earlier part of that year. For several years previously the mortgage had been pledged by Butler to Anderson as security for his debt, and the question arises whether, in view of these facts, Butler could acquire and stand upon, as against Henry Anderson or those holding in his right, a title to this land based on his neglect to pay a lawful assessment upon it (for we are now assuming it was lawful) while he was the owner, and which he was bound to pay or cause to be paid. We think the obligation of good faith would prevent him from doing this. It is true he did not warrant the title. But it was not necessary that he should have done so, if, by his relation to the property and to other parties having an interest in it, he was precluded from building up a hostile title to it in derogation of his contract. Dorr did not obtain the deeds upon his certificates of purchase. But he had the right to have them. The title, assuming the proceeding to have been legally sufficient to found one, never came to him. But this circumstance is not very material. When Butler purchased the certificates and later obtained the deeds, they came into the hands of one who, as against the title derived from Henry Anderson, had been originally charged with the obligation to pay the taxes, and although that obligation did not rest upon Dorr, it revived and attached to Butler, and effectually precluded him from setting them up as muniments of title in himself as against the title which he had for his own purposes created in another. This doctrine is now well settled:

Bispham's Equity, Sec. 265.
Kennedy v. Daly, 1 Sch. & Lef. 355, 359.
Church v. Roland, 64 Pa. St. 432.
Ashton's Appeal, 73 Pa. St. 153.
Sawyer v. Wisard, 9 Allen 39.

Kost v. Bender, 25 Mich. 516.
Dubois v. Campau, 24 Mich. 360.
O'Connell v. Pate, 59 Fed. 182, 184.

182 In Kost v. Bender, the action was by the indorsee of a promissory note against the maker. The plaintiff had been the original payee of the note, and had indorsed it for value to a bona fide holder who sold it to the payee; and the question was whether the plaintiff did not by reacquiring the note expose himself to the defenses which existed while he was the first holder. Judge Cooley, in delivering the opinion of the court, said: "If the defendant had a legal and just defense to the note, either in whole or in part, arising from the conduct of the plaintiff, it was the duty of the latter to recognize and allow it, and he had no moral right to cut it off, or to attempt to do so by any transfer. But having done so, and afterwards acquired the note a second time, the law, we think, will not permit him to take advantage of this wrong, but will remit the defendant to his original rights." And he refers to the former case of Dubois v. Campau, in the 24th Mich. as an illustration of the principle, in which the action was ejectment, where the party whose duty it was to pay certain taxes sought afterwards to claim the benefit of a tax title which was based upon his default to pay them, and which a third party had bought in and then sold to him. It was held in that case that he had no more right to claim the benefit of the title he had thus bought in than he would have had if he was the original purchaser at the tax sale. In the case referred to, the defense was made under a tax deed and possession thereunder, for a period long enough to establish a title under the statute of limitations. In the opinion of the court it was said at page 370: "But in a case where a party whose duty it is to pay all the taxes on the land allows it to be sold for such taxes to a stranger who might hold the whole against all parties, though this might terminate the tenancy while such tax title is held by another, yet it has been terminated by the wrong of the party in default; and when he purchases in the title, he and the former owners are remitted to their original position and rights as they stood before the sale, and as they would have stood had the taxes been paid when due, or had the sale for the taxes been made directly to such party in default. Such we think must be the result upon principle." And further, the court said: "We
183 think, therefore, the purchase of the tax title * * * operates merely as a payment, and gave him, the purchaser of the tax title, no additional rights to the lands, as against the plaintiff at least." And the judgment was reversed because effect had not been given to this principle. And we note in this connection that these cases were actions at law, the latter being ejectment. The rule in Michigan in regard to the nature of the action and the circumstances in which it may be maintained is the same as in the federal courts. It matters little whether the doctrine in such cases rests upon an estoppel, or upon the theory that the title never vested in the party, but was extinguished by operation of law, which we think the correct view. It was held so in Douglas v. Dangerfield, 10 Ohio, 152, 158, where Hitchcock, Ch. J., said: "If by this proceeding he could be considered

as having procured a strictly legal title, the circumstances are such as might induce a court of equity to interpose and divest him of that title at the suit of the former owner of the land. But in our view, the complainant acquired no additional rights by the purchase, and must be held to be in the same situation that he would have been had he paid the taxes before the sale."

And, indeed, the doctrine has frequently been recognized as having a peculiar adaptation to the case of one who has acquired a deed for land for taxes which he ought to have paid, especially where, as between himself and another person, he ought to have paid the taxes. A mortgagor cannot set up against his mortgagee a title founded on his default in paying the taxes. And in Smith v. Lewis, 20 Wis. 350, it was held to apply to a mortgagee as against the assignee of a mortgage. And if, in this case, Bissell, the mortgagor, had continued to be the owner, he would in like manner have been precluded from setting up a hostile tax title founded on his own default. Upon an abundant citation of authorities Judge Cooley sums up the doctrine thus: "There is a general principle applicable to such cases which may be stated thus: that a purchase made by one whose duty it was to pay the taxes shall operate as payment only; he shall acquire no rights as against a third party by the neglect of a
184 duty which he owed to such party. This principle is universal and is so entirely reasonable and just as scarcely to need the support of authority. Show the existence of the duty, and the disqualification is made out in every instance;" and then, after giving numerous illustrations, he says further: "In all such cases, and all to which the like reasons apply, the purchase as between the parties, is in law a payment only; or if made at secondhand from another who was purchaser at the public sale, it is allowed to operate, for the purposes of justice only, as a redemption." Cooley on Taxation (2d Ed.) 501-3; 3d Ed. vol. 2, 954 et seq. But counsel answers this by saying that this could not affect the legal title, that it might raise an equity, but this could not be regarded in an action of ejectment where only the legal title is in issue. It is undoubtedly the rule that the plaintiff must have the right of possession, and this usually follows the legal title. But if the defendant is under an estoppel which precludes him from the right to deny the title of the plaintiff, he cannot maintain the right to possession under a hostile title which he is estopped from asserting. The fundamental question in an injunction of ejectment is to whom does the right of possession belong.

Cincinnati v. White's Lessee, 6 Peters 431.
Dickerson v. Colgrove, 100 U. S. 578.

The question of the legal title is generally the leading factor in determining that right, but it is not in all circumstances the ultimate test. But if the acquisition of the tax title by Butler operated only as redemption, there is no occasion for invoking the doctrine of estoppel.

The judgment must be reversed; and as there was a trial by jury, we think the proper course will be to order a new trial, notwithstanding the fact that both parties requested positive instructions, and the court took the facts from the jury.

No. 1916.

United States Circuit Court of Appeals

SIXTH CIRCUIT.

ROSEWELL E. MESSINGER, Plaintiff in Error,

vs.

PETER ANDERSON, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Ohio.

RECORD.

ORIGINAL TRANSCRIPT FILED DECEMBER 30, 1908.

1 *Transcript of Record.*

In the United States Circuit Court of Appeals for the Sixth Circuit.

No. —.

ROSEWELL E. MESSINGER, Plaintiff in Error,
vs.
PETER ANDERSON, Defendant in Error.

Stipulation.

In the above entitled proceeding in error, it is hereby mutually agreed between the parties signing this stipulation, that the transcript of the record sent up by the clerk of the Circuit Court of the United States, for the Western Division of the Northern District of Ohio, at Toledo, Ohio, shall be printed entire as sent up by said clerk, but that the exhibits attached to the bill of exceptions in said cause, and made part of the record therein, shall not be printed unless required by order of said Circuit Court of Appeals; the substance of the matters evidenced by said several exhibits being fully and correctly set forth in the body of said bill of exceptions.

December 28, 1908.

O. B. SNIDER,
C. W. EVERETT AND
KING, TRACY, CHAPMAN AND WELLES,
Attorneys for Plaintiff in Error.

R. P. CARY,
C. A. THATCHER,
C. H. TRIMBLE,
Attorneys for Defendant in Error.

In the United States Circuit Court of Appeals, for the Sixth Circuit. Rosewell E. Messinger, Plaintiff in Error, vs. Peter Anderson, Defendant in Error. Stipulation. Filed January 5, 1909. Frank O. Loveland, Clerk. O. B. Snider, C. W. Everett and King, Tracey, Chapman & Welles, Attorneys.

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, ss:

Record of the proceedings of the Circuit Court of the United States within and for the Western Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the city of Toledo, in said District on the first Tuesday in June, being the second day of said month in the year of our Lord one thousand
2 nine hundred and eight, and of the Independence of the United States of America the 133d, to-wit: on the 30th day of November, A. D. 1908.

Present, the Honorable Robert W. Tayler, United States District Judge.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL E. MESSINGER.

Said action was commenced on the 27th day of December, A. D. 1904, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order, and on the dates hereinafter stated, to-wit:

In the Circuit Court of the United States for the Eastern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL MESSENGER, Defendant.

Petition.

Plaintiff says that he is a citizen and resident of the state of Tennessee, and the defendant is a citizen and resident of the County of Lucas, State of Ohio.

That this action is brought to recover possession of real estate situated in Lucas County, Ohio, the value of which exceeds, exclusive of costs, the sum of one hundred thousand ($100,000.00) dollars and to recover damages amounting to ten thousand ($10,000.00) dollars.

First.

For a first cause of action against the defendant, plaintiff says that he has a legal estate in, is the owner in fee simple of, and is entitled to the immediate possession of the following described real estate, to-wit:

Lots numbered twenty (20), twenty-one (21) except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof, thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), ten hundred and eight (1008), and ten hundred and nine (1009), all in the Vistula Division of the city of Toledo, county of Lucas, state of Ohio.

That said lots exceed $100,000.00 in value.

That the defendant unlawfully keeps the plaintiff out of the possession of said premises.

Second.

For a second cause of action against the defendant, plaintiff says that he is a citizen and resident of the state of Tennessee, and that the defendant is a citizen and resident of the county of Lucas, State of Ohio.

That since the sixteenth day of September, 1902, the plaintiff has had a legal estate in, has been the owner in fee simple of and is entitled to the use and possession of the following described real estate, to-wit:

Lots numbered twenty (20), twenty-one (21) except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof, thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), ten hundred and eight (1008), and ten hundred and nine (1009), all in the Vistula Division of the city of Toledo, county of Lucas, and state of Ohio.

That the defendant has been wrongfully keeping plaintiff out of the possession of said real estate, and has received the rents, issues and profits therefrom since the said 16th day of September, 1902. That by reason thereof, plaintiff has lost said rents and profits and has sustained damages by reason of the unlawful withholding of the possession of said property from plaintiff during said time, all of which is of the value and damage to plaintiff in the sum of ten thousand ($10,000.00) dollars.

Wherefore, plaintiff prays for judgment against the said defendant for the recovery of the possession of said premises, and also for said sum of $10,000.00, with interest thereon, and also for any rents and profits or damages which may accrue subsequently to the filing of this action, up to and including the time that judgment may be entered in favor of plaintiff. Plaintiff prays for costs and all other relief to which he may be entitled.

PETER ANDERSON,
By CHAS. A. THATCHER,
RHEA P. CARY,
His Attorneys.

STATE OF TENNESSEE,
Shelby County, ss:

Peter Anderson, being first duly sworn, says that he is the plaintiff in the above entitled action; that the allegations contained in the foregoing petition are true as he verily believes.

PETER ANDERSON.

Subscribed in my presence and sworn to before me this the 24th day of December, A. D. 1904.

[NOTARIAL SEAL.]

M. W. ALLEN,
Notary Public, Shelby County, Tennessee.

Precipe.

To the Clerk of the United States Circuit Court for the Northern District of Ohio, Western Division.

SIR: Issue summons for the above named defendant addressed to the United States Marshal of this court, returnable according to law.

Endorse on the same "Action for money, amount claimed,
4 $10,000.00; and for the possession and delivery of real estate."

CHAS. A. THATCHER,
RHEA P. CARY,
Attorneys for Plaintiff.

(Endorsement:) No. 1897. United States Circuit Court, Northern District of Ohio, Western Division. Peter Anderson, plaintiff, vs. Rosewell Messenger, defendant. Petition. Filed December 27, 1904 Irvin Belford, Clerk. Charles A. Thatcher, attorney and counsellor, Gardner Building, Toledo, Ohio.

December Term, A. D. 1907, to wit, February 3, 1908.

Present: The Honorable Robert W. Tayler, United States District Judge.

No. 1897.

PETER ANDERSON, Plaintiff.
vs.
ROSEWELL E. MESSINGER, Defendant.

Order.

On motion therefor by the defendant, Rosewell E. Messinger, and for good cause shown, leave is hereby granted said defendant to file an amended and supplemental answer herein within thirty days.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff.
vs.
ROSEWELL MESSENGER, Defendant.

Amended and Supplemental Answer.

Leave of court thereunto having been first duly obtained, now comes the defendant, Rosewell E. Messenger, and for amended and supplemental answer to the petition herein says:

First Defense.

For first defense herein, this answering defendant, Rosewell E. Messenger, admits that the plaintiff, Peter Anderson is a citizen and resident of the state of Tennessee; that defendant is a citizen and resident of Lucas county, in the state of Ohio; that this action is brought to recover possession of real estate situate in Lucas county, Ohio, the value of which exceeds, exclusive of costs, the sum of one hundred thousand dollars ($100,000.00), and to recover alleged damages in the sum of ten thousand ($10,000.00); that defendant is in the possession, and is now and has been keeping plaintiff out of the possession of the real estate described in plaintiff's petition, and has received the rents, issues and profits therefrom since the 6th day of September, 1902.

This answering defendant denies that the plaintiff has the legal estate or any other title in or to the said real estate, or any part thereof; defendant denies that the plaintiff is the owner of said real estate in fee simple or otherwise; and defendant denies that plaintiff is entitled to the possession of said real estate, or of any part thereof.

For further answer to said petition, this answering defendant denies each and very allegation therein contained not hereinabove expressly admitted or denied.

Second Defense.

For second defense herein, this answering defendant, Rosewell E. Messenger, further says that on August 17, 1905, the plaintiff, Peter Anderson, commenced an action in ejectment in the court of common pleas of Lucas county, Ohio, same being a court of general jurisdiction, against this answering defendant, Rosewell E. Messenger, and others, said action being known as No. 53,924 in said court, and in the petition filed by said plaintiff therein, he alleged for a first cause of action against the defendants in said action, including this answering defendant, that said plaintiff had a legal estate in, was the owner in fee simple of and entitled to the immediate possession of lots numbered nineteen (19), except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof, twenty-one (21); and thirty-three (33) in the Vistula Division of the city of Toledo, Lucas county, Ohio, and other adjacent premises in said city, and that said defendants, including this answering defendant, were unlawfully keeping said plaintiff out of the possession of said premises;

And this answering defendant further says that in said petition filed by said plaintiff, he alleged for a second cause of action against said defendants, including this answering defendant, that since September 16, 1902, he had had a legal estate in, had been the owner in fee simple of, and was entitled to the possession of said above described and said other real estate; and that said defendants, including this answering defendant had been wrongfully keeping said plaintiff out of the possession thereof, and had received the

rents, issues and profits therefrom since September 16, 1902, to the damage of said plaintiff in a sum in excess of fifty thousand dollars ($50,000.00).

This answering defendant further says that in said petition in said action, said plaintiff prayed for judgment against said defendants, including this answering defendant, for the recovery of the possession of said above described and said other real estate, and also for said sum of fifty thousand dollars ($50,000.00), with interest, and any subsequently accruing rents, profits or damages; and further prayed for the recovery of costs and for all other legal and equitable relief to which said plaintiff might be entitled.

6 This answering defendant further says that on February 21, 1906, this answering defendant filed in said action an amended answer to said petition filed therein; and in said amended answer denied that said plaintiff, Peter Anderson, had a legal estate or title or any other estate or title in and to the premises sought to be recovered by said plaintiff in said action from this defendant; and denied that said plaintiff, Peter Anderson, was the owner in fee simple or otherwise of said real estate or of any part thereof; and entitled to the possession of said real estate, or of any part thereof; this answering defendant in said amended answer admitting that he then was and ever since September 16, 1902, has been receiving the rents, issues and profits of said premises, and then was and ever since said date had been keeping said plaintiff, Peter Anderson, out of the possession of said real estate.

This answering defendant, Rosewell E. Messenger, further says that in said amended answer, he alleged that he was the owner in fee simple, had the legal title to, and was in the actual possession of said real estate, and had received the rents, issues and profits thereof since December 22, 1896; and denied the claims asserted in said action by said plaintiff to said premises and against said defendant.

This answering defendant, Rosewell E. Messenger, further says that said cause No. 53,924 was tried upon said pleadings, upon its merits in said court of Common Pleas of Lucas county, Ohio, at the January term, 1906, thereof, before the Honorable Julian H. Tyler, one of the judges of said court, and a jury duly empaneled and sworn; and on March 2, 1906, said jury returned a verdict in said case in favor of the defendants therein, including this answering defendant, Rosewell E. Messenger; that on March 31, 1906, at the January term 1906, of said court, a judgment in said cause was duly rendered upon said verdict, in favor of the defendants in said action, including this answering defendant, Rosewell E. Messenger, and against said plaintiff, Peter Anderson; that thereby it was ordered and adjudged that the petition of said plaintiff, Peter Anderson, be dismissed, and judgment was awarded in favor of the defendants in said action, including this answering defendant, Rosewell E. Messenger, and against said plaintiff, Peter Anderson for the costs incurred in said action by said defendants, respectively.

This answering defendant further says that said judgment of the court of common pleas of Lucas county, Ohio, remains

7 unreversed and, by virtue of the statutes of the state of Ohio, is in full force and effect.

This answering defendant, Rosewell E. Messenger, further alleges that at the time of the commencement of said action No. 53,924 in said court of common please of Lucas County, Ohio, wherein said judgment was rendered, he had the title to, was the owner and in possession of said lot number nineteen (19) except the southeast nineteen (19) feet of the southwest eighty (80) feet therof, and lot number twenty-one (21) in the Vistula Division of the city of Toledo, Lucas county, Ohio, being part of the premises for the recovery of which said action was brought; and that said lot number twenty-one (21) except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof, is a part of the premises described in the petition in the above entitled action in this court.

This answering defendant, Rosewell E. Messenger, further says that his title to the real estate, the recovery of which is sought in the above entitled action, and the title asserted thereto by said defendant, Peter Anderson, respectively are the same and are based upon the same facts as the title of this answering defendant and that asserted by said plaintiff, respectively, to the real estate the recovery of which was sought in said action No. 53,924 in said court of Common Pleas of Lucas county, Ohio; and that the above entitled action involves the same questions of fact and law and substantially the same issues as were involved in said action in said state court; and this answering defendant says that said questions of fact and law and said issues were, in said action, each and all fully determined and finally adjudicated by said court of common pleas of Lucas county, Ohio, against said plaintiff, Peter Anderson, and in favor of this answering defendant, Rosewell E. Messenger; and that thereby the several causes of action set forth in the petition in the above entitled action were fully determined and finally adjudicated against said plaintiff and in favor of this answering defendant; and that by reason thereof, plaintiff is estopped and barred from asserting or maintaing any claim or title to or on account of the real estate described in the petition herein, adverse or hostile to the interest and title therein and thereto of this answering defendant.

Third Defense.

For third defense herein, this answering defendant, Rosewell E. Messenger, further says that on October 25, 1906, the United States Mortgage & Trust Company, a corporation duly organized and existing under the laws of the state of New York, commenced, two actions in the court of common pleas of Lucas County, Ohio, same being a court of general juri-diction, at law and in equity, said actions being known as Nos. 55,794 and 55,795 therein, wherein said United States Mortgage & Trust Company was plaintiff, and the plaintiff in the above entitled action, Peter Anderson, and this answering defendant, Rosewell E. Messenger, and Estelle P. Messenger, his wife, and one Emily O. Butler and others were defendants;

That in the petition filed by said United States Mortgage & Trust Company in said action No. 55,794, said company alleged in sub-

stance that it held a certain mortgage upon that part of lots numbers thirty (30), thirty-one (31), thirty-two (32), one thousand and eight (1008) and one thousand and nine (1009) in the Vistula Division of the city of Toledo, Lucas county, Ohio, described as follows:

Beginning at the intersection of the southeasterly boundary line of St. Clair street and the southwesterly boundary line of Cherry street, running thence in a southeasterly direction along said boundary line of Cherry street a distance of two hundred and six and 40-100 (206.40) feet; thence in a southwesterly direction at right angles with Cherry street, a distance of sixty-four and 99-100 (64.99) feet; thence in a northwesterly direction along a line parallel with Cherry street, to Summit street; thence in a northeasterly direction along Summit street to St. Clair street; thence in a northeasterly direction along St. Clair street to the place of beginning;

That said mortgage was duly executed and delivered to said company by this answering defendant, Rosewell E. Messenger, to secure an indebtedness on the part of this answering defendant to said company in the sum of forty-five thousand ($45,000) dollars and interest thereon; that said mortgage was duly recorded at page 603 in volume 211 of the mortgage records of Lucas county, Ohio; and after setting forth the conditions of said mortgage, said company alleged in said petition that the indebtedness secured by said mortgage had become due; that the conditions of said mortgage had been broken; and that same had become absolute.

In said petition in said action No. 55794, said company further alleged that said defendant, Peter Anderson, the plaintiff in the above entitled action, claimed to be the owner in fee simple of said premises; that said defendant, Emily O. Butler, claimed an interest in said premises as mortgagee, adverse and hostile to the claim of said company; and that the other defendants in said action claimed an interest in said premises adverse and hostile to the claim of said company; and said company in said petition asked that said
9 defendants should be required to answer said petition and set forth their respective claims, or that they should be forever barred therefrom; and said company in said petition prayed that said court should determine the amount due to it upon said indebtedness; that said mortgage should be foreclosed, said premises ordered sold, and the proceeds applied on said indebtedness, and for all necessary equitable relief.

This answering defendant, Rosewell E. Messenger, further says that in the petition filed by said United States Mortgage & Trust Company in said action No. 55,795, said company alleged in substance that it held a certain mortgage upon all that part of said lots numbers thirty (30), thirty-one (31), one thousand and eight (1008) and one thousand and nine (1009) in the Vistula Division of the city of Toledo, Lucas county, Ohio, lying southwest of a line parallel with and sixty-four and 99-100 (64.99) feet southwest of the southwest boundary line of Cherry Street;

Also upon all that part of lot number thirty-two (32) in said Vistula Division of the city of Toledo, Lucas county, Ohio, lying

southwest of said line parallel with and sixty-four and 99/100 (64.99) feet southwest of said southwest boundary line of Cherry street; and also all that part of said lot number thirty two (32) lying southeast of a line drawn at right angles with Cherry street from a point two hundred and six and 40/100 (206.40) feet southeast of the southeast line of St. Clair street and northeast of a line parallel with and sixty-four and 99/100 (64.99) feet southwest of the southwest boundary line of Cherry street;

And also upon all that part of lot number nineteen (19) in the Vistula Division of the city of Toledo, Lucas county, Ohio, lying northwest of a line parallel with and nineteen (19) feet northwest of the southeast line of said lot nineteen (19) and also upon all that part of said lot number nineteen (19) lying southeast of said parallel line and northeast of a line parallel with and eighty (80) feet northeast of the southwest line of said lot number nineteen (19);

And also upon the whole of lots numbers twenty (20) and twenty-one (21) in said Vistula Division of the city of Toledo, Lucas county, Ohio;

That said mortgage was duly executed and delivered to said company by this answering defendant, Rosewell E. Messenger, and by said Estelle P. Messenger, his wife, to secure an indebtedness on the part of this answering defendant to said company of eighteen thousand dollars ($18,000.00) and interest thereon; that said mortgage was duly recorded at page 464 in volume 279 of the mortgage records of Lucas county, Ohio; and after setting forth the conditions of said mortgage, said company alleged in said petition that the indebtedness secured by said mortgage had become due; that the conditions of said mortgage had been broken; and that same had become absolute.

In said petition in said action No. 55,795, said company further alleged that said defendant, Peter Anderson, the plaintiff in the above entitled action, claimed to be the owner in fee simple of said premises; that said defendant, Emily O. Butler, claimed an interest in said premises as mortgagee, adverse and hostile to the claim of said company; and that the other defendants in said action claimed an interest in said premises adverse and hostile to the claim of said company; and said company in said petition asked that said defendants should be required to answer said petition and set forth their respective claim, or that they should be forever barred therefrom; and said company in said petition prayed that said court should determine the amount due to it upon said indebtedness; that said mortgage should be foreclosed, said premises ordered sold, and the proceeds applied on said indebtedness, and for all necessary equitable relief.

This answering defendant Rosewell E. Messenger, further says that on November 15, 1906, said Emily O. Butler, one of the defendants in said actions Nos. 55,794 and 55,795, duly filed a cross-petition in each of said actions, alleging in substance in each of said pleadings that she held a mortgage duly executed and delivered to her by this answering defendant, Rosewell E. Messenger, and his wife, to secure an indebtedness of five thousand dollars ($5,000.00) and interest, owing to her from this answering defendant; that said

mortgage constituted a lien upon all of the premises in said Vistula Division of the city of Toledo, Lucas county, Ohio, described in the petition herein, except lot number thirty-three (33) in said Vistula Division; that said mortgage was duly recorded at page 301 in volume 328 of the mortgage records of said county; and after setting forth in each of said cross-petitions the conditions of said mortgage, said Emily O. Butler alleged in said pleadings, respectively, that the indebtedness secured by said mortgage had become due; that the conditions of said mortgage had been broken; that said mortgage was a lien upon said premises next in order of priority after the lien of the respective mortgages of said United States Mortgage & Trust Company and taxes; and that said defendant, Peter Anderson, the plaintiff in the above entitled action, had no right, title or interest in or to said mortgaged premises, and in each of said pleadings prayed for the foreclosure of said mortgage, the sale of said premises upon execution to satisfy the amount due thereunder and costs, and for all other and further equitable relief.

This answering defendant, Rosewell E. Messenger, further says that on November 19, 1906, he filed an answer and cross-petition in each of said actions Nos. 55,794 and 55,795, alleging in substance in each of said pleadings that the principal indebtedness set up in the petitions in each of said actions had not yet become due and payable; that he was the good faith purchaser, the owner and in possession of the premises described in said petitions and also described in the answers and cross-petitions filed therein by said Emily O. Butler; that said Peter Anderson, one of the defendants in said actions, and the plaintiff in the above entitled action, was publicly claiming to be the owner and entitled to the possession of said premises; but this answering defendant alleged in substance that he had acquired his said title to said premises without notice or knowledge of said alleged claims thereto by said Peter Anderson, and asked that said Peter Anderson should be required to answer said cross-petitions setting forth the estate or interest claimed by him therein; that same should be adjudged null, void and of no effect; that the title and possession of this answering defendant, Rosewell E. Messenger, should be quieted against same; and also prayed for all other proper equitable relief.

This answering defendant, Rosewell E. Messenger, further says that on March 18, 1907, said Peter Anderson, plaintiff in the above entitled action, without objection or protest of any kind, appeared as a defendant before said Court of Common Pleas of Lucas county, Ohio, in each of said sections Nos. 55,794 and 55,795, and upon application to the court therefor duly obtained leave to plead therein.

This answering defendant, Rosewell E. Messenger, further says that on March 27, 1907, said Peter Anderson, plaintiff in the above entitled action, filed separate demurrers to each of said petitions filed by said United States Mortgage & Trust Company, in each of said actions Nos. 55,794 and 55,795 in said Court of Common Pleas of Lucas county, Ohio, and also filed separate demurrers to each of said cross-petitions filed therein by said Emily O. Butler and by this answering defendant, Rosewell E. Messenger, respectively, each

of said demurrers being based upon special and general grounds; that thereafter each and all of said demurrers were argued at length before and submitted to Hon. John F. Kumler, one of the judges of said Court of Common Pleas, of Lucas county, Ohio; and on April 13, 1907, said demurrers were by said court each and all overruled.

12 This answering defendant, Rosewell E. Messenger, further says that on April 27, 1907, said Peter Anderson, plaintiff in the above entitled action, filed an answer to each of said petitions of said United States Mortgage & Trust Company in each of said actions Nos. 55,794 and 55,795, in each of said answers admitting in substance that United States Mortgage & Trust Company was a corporation duly incorporated and organized under the laws of New York; that this answering defendant, Rosewell E. Messenger, was indebted to said company as alleged in said petitions; that to secure the payment of said indebtedness, said Rosewell E. Messenger, this answering defendant, had executed and delivered to said company the several mortgages described in said petitions, respectively; that said Estelle P. Messenger, had joined in the execution of said mortgages; that said mortgages were conditioned as alleged in said petitions, respectively, and were filed and recorded as in said petitions averred; and that the taxes due on said premises became delinquent in June, 1906.

This answering defendant, Rosewell E. Messenger, further says that in each of said answers filed as aforesaid by said Peter Anderson in said actions Nos. 55,794 and 55,795, said Peter Anderson alleged in substance, among other things, that he was the owner in fee simple of said mortgaged premises and entitled to the immediate possession thereof; that this answering defendant, Rosewell E. Messenger, was not the owner of said premises and had no title thereto except a life estate therein; and after making certain other admissions and allegations, said Peter Anderson denied all the other allegations in each of said petitions, and prayed that said actions, respectfully, should be dismissed as to him.

This answering defendant, Rosewell E. Messenger, further says that on May 9, 1907, said United States Mortgage & Trust Company filed a reply to each of said answers of said Peter Anderson to each of said petitions in each of said actions Nos. 55,794 and 55,795, denying in substance, among other things, that this answering defendant, Rosewell E. Messenger, had no title or interest in said mortgaged premises, and denying that said Peter Anderson was the owner of said premises, and *during* that he was entitled to the immediate possession thereof.

This answering defendant, Rosewell E. Messenger, further says that on April 27, 1907, said Peter Anderson, plaintiff in the above entitled action, filed an answer to each of said cross-petitions of said Emily O. Butler, in each of said actions Nos. 55,794 and 55,795, in each of said answers admitting in substance that this answer-

13 ing defendant, Rosewell E. Messenger, had executed and delivered to said Emily O. Butler the mortgage described in said cross-petitions; that same was given to secure the sum of five thousand dollars ($5,000.00) which had theretofore been borrowed

by said Rosewell E. Messenger from said Emily O. Butler; that in each of said answers said Peter Anderson denied that he had no title to said mortgaged premises; and said Peter Anderson in each of said answers alleged in substance that he was the owner in fee simple of said mortgaged premises and entitled to the immediate use and possession thereof; and after making certain other admissions and allegations in said answers, said Peter Anderson denied all the other allegations in each of said cross-petitions, and prayed that same should be dismissed as to him.

This answering defendant, Rosewell E. Messenger, further says that on May 11, 1907, said Emily O. Butler filed a reply to each of said answers of said Peter Anderson to each of said cross-petitions in each of said actions Nos. 55,794 and 55,795, denying in substance, among other things, that said Anderson was the owner in fee simple of said mortgaged premises and entitled to the immediate use and possession thereof; and that at the time of the execution of said mortgage said Rosewell E. Messenger, this answering defendant, had no title in and to said premises.

This answering defendant, Rosewell E. Messenger, further says that in said replies filed by said Emily O. Butler in said actions Nos. 55,794 and 55,795, said Emily O. Butler further alleged that on May 6, 1907, she duly obtained a judgment against said defendant, Rosewell E. Messenger, upon the note secured by said mortgage; that on said day, she caused an execution to be issued on said judgment by the clerk of said Court of Common Pleas, of Lucas County, Ohio, directed to the sheriff of Lucas county, Ohio, commanding him to levy same upon the property of said defendant, Rosewell E. Messenger; that said execution was on said day by said sheriff, for want of goods and chattels whereon to levy, duly levied upon all of said mortgaged premises, including and being the same property described in the petitions filed in said actions Nos. 55,794 and 55,795 by said United States Mortgage & Trust Company; and that said sheriff on the same day duly made his return of such levy to said Court of Common Pleas and filed the same with the clerk thereof; and prayed that an account might be taken in said actions, with respect to the amount due said cross-petitioner, Emily O. Butler, on said
14 judgment, and for all proper equitable relief, as prayed for in said original cross-petitions, respectively.

This answering defendant, Rosewell E. Messenger further says that on April 13, 1907, leave thereunto having been first duly obtained from said Court of Common Pleas, of Lucas county, Ohio, he filed an amended and supplemental answer and cross-petition in each of said actions Nos. 55,794 and 55,795, alleging in substance in each of said pleadings for cause of action against Peter Anderson, one of the defendants in each of said actions, that since 1896, for a long time prior to, and at the time of the commencement of said actions, said Rosewell E. Messenger, was, had ever since been, and then was in the actual possession of the real estate described in said petitions in said actions of said United States Mortgage & Trust Company; that during all of said time, said cross-petitioner, Rosewell E. Messenger, this answering defendant, had been and was the owner of said

premises; that said Peter Anderson gave out and publicly stated and claimed that he was the owner and entitled to the possession of said premises as remainderman under the last will and testament of his grandfather, Henry Anderson, deceased, formerly of Holly Springs, Marshall county, Miss., and that said Rosewell E. Messenger had at all times disputed and denied said statement, and disputed and denied same.

This answering defendant, Rosewell E. Messenger, further says that in each of said amended and supplemental answers and cross-petitions filed by him in said actions Nos. 55,794 and 55,795, for cause of action against said defendant, Peter Anderson, he further alleged as follows:

"That on or about July 1, 1841, one Charles Butler, of New York City, executed in favor of said Henry Anderson, a note of said date for twenty thousand dollars ($20,000.00), payable one day after date, with interest thereon at six per cent. per annum; that on or about September 23, 1841, said Charles Butler, to secure the payment of said note, assigned and transferred to said Henry Anderson a certain note dated May 19, 1838, for twenty-one thousand five hundred dollars ($21,500.00), executed by one Edward Bissell and payable to the order of said Charles Butler, and also therewith assigned and transferred to said Henry Anderson a certain mortgage securing said Bissell note, said mortgage being executed by said Bissell and his wife to said Butler upon all of the premises hereinafter and in the petition herein described, which mortgage had previously been duly recorded at pages 267 and 269 in volume 2 of the mortgage records kept in the recorder's office of Lucas county, Ohio; that the said assignment of said mortgage to said Henry Anderson set forth that and in fact the same was in trust for the benefit of said Charles Butler, and said Henry Anderson received from said Butler, and at all times thereafter held said note and mortgage as collateral security for the payment of Butler's said note to said Henry Anderson and for no other purpose;

"That on or about September 9, 1843, said Henry Anderson commenced an action in the Court of Common Pleas, of Lucas county, Ohio, in chancery, to foreclose said Bissell mortgage, said Henry Anderson being the complainant and said Edward Bissell and wife and others being defendants therein; that such proceedings were thereafter had in said action, that said court at its April term, 1844, entered a decree finding the amount due upon the indebtedness secured by said mortgage and ordering said mortgaged premises sold for the payment thereof; that thereafter an order of sale was issued upon said decree to one Edson Allen, master in chancery of said court, who in pursuance of said decree, on or about September 24, 1844, sold said premises to said Henry Anderson at the price of six thousand, nine hundred and twenty-one dollars ($6,921); that thereafter said master gave said Anderson a deed for said premises, based upon said sale and dated November 18, 1844; that said Charles Butler was not a party to said suit and was not bound thereby, and his rights in, to and under said Bissell mortgage remained the same as between him and said Anderson and were in no manner affected by said action, decree, pro-

ceedings, sale and deed, but said Anderson received said deed thereafter held whatever title was thereby conveyed to him, in trust as security for the debt of said Butler to said Anderson, and on the same terms and conditions upon which he had previously held said Bissell note and mortgage, and not otherwise; that said deed from said master commissioner to said Henry Anderson was, as to said Charles Butler, in fact a mortgage to secure the indebtedness then owing from said Butler to said Anderson, and upon the payment of said indebtedness, said Butler was entitled to have the title to said property conveyed to him by said Anderson;

"That after receiving said deed said Henry Anderson on or about April 3, 1846, departed this life, until the time of his death being a resident of Holly Springs, in Marshall county, Miss.; that he left a will which was afterwards duly probated, allowed and recorded in and by the Probate Court of Marshall county, Miss., which
16 court by the constitution and laws of said state, had jurisdiction to probate said will; that Peter Anderson, a brother of said Henry Anderson, Walter Goodman and Peter W. Lucas, all residents of Marshall county, Miss., were nominated in and by said will as the executors thereof and trustees of the estate of said Henry Anderson, and were afterwards, during April, 1846, duly appointed by said court such executors and trustees, and were fully authorized and empowered to execute the last will and testament of said Henry Anderson, deceased, and to administer his estate, and to adjust, release and discharge all claims in favor thereof; that said Peter Anderson, Walter Goodman and Peter W. Lucas duly entered upon their duties as such executors and trustees, and thereafter continued in the discharge thereof; that whilst said executors and trustees were acting as aforesaid, they demanded payment from said Charles Butler of said $20,000 note, with interest thereon from July 1, 1841, and without any deduction therefrom or credit thereon for said property purchased by said Henry Anderson at said master's sale in said foreclosure suit; and that said Charles Butler from time to time thereafter paid to said executors and trustees the full amount of principal and interest due thereon, but said cross-petitioner says that he does not know, and has not the means of knowing, the exact dates and amounts of said payments, and is therefore unable to state same, but that said facts are well known to said defendant Peter Anderson.

"This defendant and cross-petitioner further says that on or about October 1, 1855, Peter Anderson and Walter Goodman, two of said executors and trustees, for a full and valuable consideration and in pursuance of authority duly conferred upon them by said last will and testament of said Henry Anderson, deceased, duly executed, acknowledged and delivered to said Charles Butler, then living, but since deceased, an instrument in writing in due form of law, relinquishing to said Charles Butler, his heirs and assigns, all the interest and title theretofore held by said Henry Anderson in and to all the premises described in the petition herein and other premises, part of which was adjacent thereto, same being described in said deed as follows:

"All those certain lots or parcels of land situate, lying and being in

the Vistula division of the city of Toledo, county of Lucas, state of Ohio, known and designated as lots number eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1008), one thousand and nine (1009), thirty (30), thirty-
17 one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1000) and one thousand one (1001), said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry and westerly by Lynn street, as said lots were laid out and numbered on the record map of said city; together with all and singular the edifices, buildings, rights, privileges, advantages, hereditaments and appurtenances to the same belonging, or in any wise appertaining; and the reversion and reversions, remainder and remainders, issues and profits thereof;

"And this defendant and cross-petitioner, Rosewell E. Messenger, further says that in consideration of the payment of said indebtedness made to said executors, the receipt whereof was duly acknowledged, said executors, by the terms of said instrument in writing, fully and forever expressly released and discharged said claim against said Charles Butler and said lien against said premises and confirmed the title thereto unto said Charles Butler, his heirs and assigns forever;

"That said instrument in writing was thereafter duly filed for record with, and was recorded by the recorder of Lucas county, Ohio, at page 110 and following in volume 34 of the public records of deeds of Lucas county, Ohio;

"That thereafter, on or about April 16, 1868, Peter W. Lucas, one of the executors and trustees of the estate of Henry Anderson, deceased, executed a like instrument in writing, relinquishing to said Charles Butler, his heirs and assigns, all the interest and title theretofore held by said Henry Anderson in and to all of said premises last above described. Said instrument in writing was duly executed and was thereafter recorded at pages 112 to 114 in volume 34 of the records of deeds of Lucas county, Ohio.

"Said defendant and cross-petitioner, Rosewell E. Messenger, further says that after the execution, acknowledgment, delivery and record of said instruments in writing, as aforesaid, cross-petitioner's grandfather, Calvin Bronson, of Toledo, Ohio, then living, but since deceased, and the person under whom said defendant and cross-petitioner, Rosewell E. Messenger, claims title to said mortgaged and other premises,—in good faith, in full reliance upon the title theretofore acquired to said premises by said Charles Butler, and for a full and valuable consideration, to-wit: $17,500, by said Calvin Bronson then paid to said Charles Butler,—purchased from said Charles Butler all of the property last hereinbefore specifically described, including the property described in the petition; that thereupon said Charles Butler on or about April 23, 1860, upon
18 and for said consideration paid by said Calvin Bronson, as aforesaid, duly conveyed said premises to said Calvin Bronson, his heirs and assigns, forever, by deed duly recorded at page 116 and following in volume 34 of the public records of deeds of

Lucas county, Ohio; that thereafter, on or about December, 1886, this defendant and cross-petitioner, Rosewell E. Messenger, by regularly executed deeds of conveyance to himself from the other heirs of said Calvin Bronson, deceased, acquired and now owns, holds and is in possession of all of that portion of said premises and property next hereinbelow described, and has succeeded to, acquired and owns the entire right, title estate and interest therein acquired by said Calvin Bronson from said Charles Butler, as aforesaid, viz:

"All of lot nineteen (19), except the east nineteen (19) feet of the southwest eighty (80) feet thereof; all of lot twenty (20); all of lot twenty-one (21), and all of lots thirty (30), thirty-one (31), thirty-two (32), and — thousand and eight (1008) and one thousand and nine (1009), all in the Vistula division, of the city of Toledo, Lucas county, and state of Ohio, together with the improvements, privileges, and appurenances unto said premises belonging.

"Said defendant and cross-petitioner, Rosewell E. Messenger, further says that he acquired his title to said premises as aforesaid, for a full and valuable consideration paid in good faith and in full reliance upon the title theretofore acquired to said premises by said Calvin Bronson, deceased, and without knowledge or notice of any kind whatsoever of any claim on the part of said defendant, Peter Anderson, to any estate, title or interest in or to said premises, or any part thereof; that said defendant, Peter Anderson, is the only living descendant and the only heir at law of said Henry Anderson, deceased; that said defendant, Peter Anderson, claims and publicly gives out that said instrument in writing from said executors and trustees of said Henry Anderson to said Charles Butler, are for some reason unknown to this defendant and cross-petitioner, defective and insufficient to relinquish and release the interest or title which Henry Anderson theretofore had in and to said lands; and this defendant and cross-petitioner says that said defendant, Peter Anderson, has no claim, lien, title estate or interest whatsoever in and to said premises or any part thereof, as heir or devisee of said Henry Anderson, deceased, or otherwise; and any claim, lien title, estate or interest in and to said premises or any part thereof, made or asserted by said defendant, Peter Anderson, is by reason of the facts herein set forth, inferior and subordinate to the rights, title and equities therein of this defendant and
19 cross-petitioner; that if said instruments in writing of said executors and trustees were, or for any reason are insufficient to relinquish and release the title to said premises theretofore held by Henry Anderson, then the title asserted to said premises by said defendant, Peter Anderson, is in trust and for the benefit of this defendant and cross-petitioner; and that same should be conveyed by said Peter Anderson to this defendant and cross-petitioner as the real owner of said premises."

This answering defendant, Rosewell E. Messenger, further says that in each of said amended and supplemental answers and cross-petitions filed in said actions Nos. 55,794 and 55,795, he further alleged in substance the bringing by said Peter Anderson of the

above entitled action at law in ejectment in this court on or about December 24, 1904, to recover the possession of the premises described in the petition in said action and damages for the detention thereof; that said action had been tried upon its merits in this court before Hon. Robert W. Tayler, judge of said court, and a jury, and had resulted in a judgment in favor of said Rosewell E. Messenger; that said Peter Anderson and his counsel gave out and publicly stated that they expected and intended to prosecute proceedings in error to the honorable Circuit Court of Appeals for the Sixth Circuit, to review said judgment; that under the law and rules of practice applicable to the federal courts, said Rosewell E. Messenger had not the right to allege and prove upon the trial of said action before said United States Circuit Court, and had not the right to present to said Circuit Court of Appeals the facts set forth in said cross-petitions, respectively, which would have established and which do establish the equitable cause of action and defenses necessary to be alleged and proven in order to fully protect, maintain, establish and assure said Rosewell E. Messenger in his said title to said premises, and with respect to which, and by reason whereof said Rosewell E. Messenger was without adequate remedy at law.

In each of said cross-petitions, said Rosewell E. Messenger asked that said defendant, Peter Anderson, should be required to answer in said actions and set forth said adverse estate or title if any, claimed by him, in and to said mortgaged and other premises, and that the same might be adjudicated to be null, void and of no effect; that said Peter Anderson might be restrained and enjoined by said Court of Common Pleas of Lucas county, Ohio, from proceeding further in said action at law in said Circuit Court of the
20 United States for the Northern District of Ohio, Western Division; and that said action should be stayed until the final adjudication and determination of said actions Nos. 55,794 and 55,795, respectively, in said court.

This answering defendant, Rosewell E. Messenger, further says that the prayer of each of said amended and supplemental answers and cross-petitions filed by him in said actions Nos. 55,794 and 55,795, was with respect to the claims of said Peter Anderson in substance that said claims should be declared to be null, void and of no force and effect; that the possession and title of said Rosewell E. Messenger should be quieted against the same; that in case the court should find that the instruments in writing executed by the executors and trustees of the estate of Henry Anderson, deceased, were insufficient to relinquish and release to said Charles Butler all interest and title held in said premises by Henry Anderson, and that therefore such interest and title was vested in said Peter Anderson, that said Court of Common Pleas should decree that such interest and title was so held by said Peter Anderson in trust for said Rosewell E. Messenger; that said Peter Anderson should be ordered to relinquish and release such interest and title to said Rosewell E. Messenger by executing and delivering to him a proper

instrument in writing in due form of law, within a time to be limited by said Court of Common Pleas; that in default thereof the decree of said court should so operate as to relinquish and release such interest and title to said Rosewell E. Messenger; and that he should have all further and other proper equitable relief.

This answering defendant, Rosewell E. Messenger, further says that on May 4, 1907, said Peter Anderson filed an answer to each of said amended and supplemental answers and cross-petitions filed by said Rosewell E. Messenger in said actions Nos. 55,794 and 55,795, admitting that said Rosewell E. Messenger was in 1896, and for a long time prior thereto and at the time of the commencement of said actions in the possession of said mortgaged premises, and denying that during all or any part of said time said Rosewell E. Messenger had been the owner of said premises.

This answering defendant, Rosewell E. Messenger, further says that in each of said answers filed by said Peter Anderson in said actions Nos. 55,794 and 55,795, to said amended and supplemental answers and cross-petitions of said Rosewell E. Messenger, said Peter Anderson alleged as follows:

21 "Said defendant (Peter Anderson) admits that he gives out and publicly stated and claims that he is the owner and entitled to the possession of said premises as remainderman under the will of his grandfather.

"This defendant admits the execution on July 1, 1841, by Charles Butler to Henry Anderson of the note for twenty thousand dollars mentioned in said amended and supplemental answer and cross-petition, payable and bearing interest as therein stated; admits the assignment and transfer to the said Anderson by said Butler at the time stated of the Bissell note and mortgage referred to and described in said amended and supplemental answer and cross-petition, as well as the record thereof; admits that the said assignment was in trust, but avers that the only declaration of said trust was contained in the following words:

"I hereby assign his mortgage to Henry Anderson on certain trusts as set forth in a deed this day made.

September 23, 1841.

CHARLES BUTLER."

"This defendant admits the beginning in September, 1843, of the action in the Court of Common Pleas, of Lucas county, Ohio, in chancery, which is mentioned and set forth in said amended and supplemental answer and cross-petition; admits that the said Henry Anderson was the complainant therein and Edward Bissell and wife and others were defendants; admits that a decree was entered at the April term, 1844, of said court ordering said property sold; that the same was in fact sold to Henry Anderson at the price of $5,921.00, that the master in chancery of said court duly executed a deed conveying said premises to the said Henry Anderson on November 18, 1844, but denies that Charles Butler was not a party to the said suit and not bound thereby, and denies that whatever rights therein he had theretofore had, remained unaffected by said proceedings, sale

and deed; denies that the said Henry Anderson thereafter held all title conveyed to him in trust for the said Butler; denies that the deed from said master commissioner to said Anderson was in fact a mortgage as to the said Charles Butler; denies that the said Butler was entitled to have said property conveyed to him.

"Said defendant, Peter Anderson, admits that his grandfather, the said Henry Anderson, died on or about April 3, 1846, in Holly Springs, Miss.; admits that he left a will which was afterwards duly probated; admits that Peter Anderson, Walter Goodman and Peter W. Lucas were executors and trustees under said will and qualified and acted as such; admits that the said trustees demanded payment of the indebtedness due the estate of Henry Anderson, deceased, from the said Charles Butler, but denies that credit upon such indebtedness was denied the said Butler for the amount of the purchase price of the property purchased by said Henry Anderson at said sale in said foreclosure suit; denies that the said Butler paid to said executors and trustees the full amount of interest and principal of said note, but avers the fact to be that the same is not yet paid in full.

"This defendant denies that Peter Anderson and Walter Goodman, acting as executors and trustees, conveyed the property involved herein on October 1, 1855, to the said Charles Butler, and denies that the said Peter Anderson and Walter Goodman at any time ever attempted for a full and valuable consideration and in pursuance of any authority conferred upon them to convey said property, and denies that they had any power or authority so to do.

"This defendant denies that said indebtedness due from the said Charles Butler to the estate of the said Henry Anderson, deceased, was ever paid in full to the said executors and denies that they expressly released and discharged said claim against said Butler.

"This defendant admits that on or about April 16, 1860, Peter W. Lucas, who had been one of the executors and trustees under the will of Henry Anderson, deceased, undertook to execute in his supposed capacity as executor, but not in his capacity as trustee, a deed to the said Charles Butler, which was recorded as set out in said amended and supplemental answer and cross-petition.

"This defendant admits that Calvin Bronson undertook to purchase the property involved herein from Charles Butler for a consideration of $17,500, and that the said Butler undertook to convey the same to the said Bronson, which alleged conveyance was recorded; that thereafter the said Rosewell E. Messenger attempted to acquire the same by deeds from the other heirs of the said Calvin Bronson, deceased, but denies that he now owns any rights, title or interest whatever in said property.

"This defendant denies that the said defendant, Rosewell E. Messenger, acquired any title to said premises except the life estate of this defendant's father which terminated by the latter's death September 16, 1902; and denies that his attempt to do so was without knowledge or notice of the claim upon the property of this defendant; admits that this defendant is the only living descendant and

only heir at law of Henry Anderson, deceased; admits
23 that he claims and publicly gives out that the instrument purporting to be executed by said executors and trustees of said Henry Anderson to said Charles Butler is defective and insufficient to convey the title which the said Henry Anderson had, but denies that the reason for said claim is unknown to said defendant Rosewell E. Messenger; denies that this defendant has no claim or interest in and to said property, but avers the fact to be that he is the legal owner thereof and entitled to the immediate possession of the same; denies that his title, estate and interest is inferior and subordinate to the rights or equities of the said Rosewell E. Messenger, and denies that the said Rosewell E. Messenger has any right or equity therein; denies that the title asserted by this defendant is in trust for the said Rosewell E. Messenger or any other person, and denies that the same should be conveyed by this defendant to said Rosewell E. Messenger."

This answering defendant, Rosewell E. Messenger, further says that said Peter Anderson, after making certain other admissions and allegations in said several answers to said amended and supplemental answers and cross-petitions, denied all the other allegations in said pleadings contained, and prayed that same should be dismissed as to him.

This answering defendant, Rosewell E. Messenger, further says that on May 11, 1907, he filed a reply in said actions Nos. 55,794 and 55,795 to each of said several answers filed by said Peter Anderson therein, and therein, among other things, denied that the only declaration of the trust concerning said Bissell note and mortgage was contained in the following words:

"I hereby assign this mortgage to Henry Anderson on certain trusts as set forth in a deed this day made.

September 23, 1841.

CHARLES BUTLER."

And denied that said $20,000.00 note given by said Charles Butler to said Henry Anderson had not been paid in full; and denied that the only title acquired by said Rosewell E. Messenger was the life estate of the father of said Peter Anderson; and further denied that said Peter Anderson was the legal owner of said premises and entitled to the immediate possession thereof; and after making certain admissions and allegations in said replies, denied all the other allegations in each of said answers of said Peter Anderson.

This answering defendant, Rosewell E. Messenger, further says that on May 29, 1907, by and with his consent and the con-
24 sent of said United States Mortgage & Trust Company, Emily O. Butler and Peter Anderson, said actions Nos. 55,794 and 55,795, were, by order of said Court of Common Pleas of Lucas county, Ohio, duly consolidated, and thereafter proceeded as one action; that said consolidated cause known as No. 55,794 was tried upon its merits in said Court of Common Pleas of Lucas county, Ohio, at the April term, 1907, thereof, before the Honorable John F. Kumler, one of the judges of said court, and on June 5, 1907, said

court duly rendered its judgment and decree in said consolidated action upon the issues joined therein in favor of said United States Mortgage & Trust Company, the plaintiff in said consolidated action, and in favor of said Emily O. Butler, cross-petitioner therein, and in favor of this answering defendant, Rosewell E. Messenger, cross-petitioner therein, and against Peter Anderson, defendant in said consolidated action; and that the equities upon said issues joined were with said United States Mortgage & Trust Company and said Emily O. Butler and this answering defendant, Rosewell E. Messenger, respectively, as against said Peter Anderson; and that said Peter Anderson had no claim, right, title, interest or estate whatsoever in or to the premises described in any of said pleadings in either of said actions or in any part thereof.

This answering defendant, Rosewell E. Messenger, further says that said Court of Common Pleas of Lucas county, Ohio, as a part of its said decree in said consolidated action, expressly found that each and all of the allegations in said amended and supplemental answers and cross-petitions of this answering defendant were true; that said instrument executed by said Edson Allen, master commissioner, to Henry Anderson, and recorded in volume 10 at page 108 of the records of Lucas county, Ohio, was in fact, as to Charles Butler, the then owner of the property described in said pleadings, a mortgage; that such title as said Henry Anderson took to said property by virtue of the assignment thereof was held by him as security for the payment of a debt then owing by said Charles Butler to said Henry Anderson, and for no other purpose; that thereafter said Charles Butler duly paid to said Henry Anderson and the executors of his said estate said debt in full; that said executors of Henry Anderson duly released and discharged said Charles Butler from any and all claims which the estate of said Henry Anderson had theretofore held against him, and conveyed all of the title theretofore held by said Henry Anderson, and by them as his said executors in and to said property to said Charles Butler, and forever released and discharged said Charles Butler from any and all debts, claims and demands of every kind which said Henry Anderson or his said executors had theretofore held or owned against said Charles Butler.

This answering defendant, Rosewell E. Messenger, further says that said Court of Common Pleas of Lucas county, Ohio, as a part of its said decree in said consolidated action, expressly found that said defendant and cross-petitioner, Rosewell E. Messenger, was entitled to have a release, discharge and conveyance from said defendant, Peter Anderson, of any and all claim, interest, lien or title which he had or claimed to have against the premises described in said pleadings, being premises described as follows:

"All of lot nineteen (19), except the east nineteen (19) feet of the southwest eighty (80) feet thereof; all of lot twenty (20); all of lot twenty-one (21), and all of lots thirty (30), thirty-one (31), thirty-two (32), one thousand and eight (1008), and one thousand and nine (1009), all in the Vistula division of the city of Toledo,

Lucas County, and state of Ohio, together with the improvements, privileges and appurtenances unto said premises belonging."

This answering defendant, Rosewell E. Messenger, further says that said Court of Common Pleas of Lucas county, Ohio, as a part of said decree in said consolidated action, further ordered, adjudged and decreed that within three days from June 5, 1907, said Peter Anderson should execute and deliver to said Rosewell E. Messenger a proper deed of release and quit-claim of any and all such claim, interest, lien or title of said Peter Anderson in or to said premises, and each and every part thereof; that in default thereof on the part of said Peter Anderson to so execute and deliver such deed within said time, said decree should operate as such conveyance; and that the title of said Rosewell E. Messenger, this answering defendant, to said premises, and each and every part thereof, was thereby quieted as against said Peter Anderson and any and all persons claiming under him, and said Peter Anderson was expressly barred and forever enjoined from setting up, asserting or claiming any claim, interest, lien, right, title or estate in or to said property or any part thereof.

This answering defendant, Rosewell E. Messenger, further says that by the terms of said decree the amount due said United States Mortgage & Trust Company, and said Emily O. Butler respectively, was fixed and determined, and said mortgaged premises ordered sold, and the proceeds applied in satisfaction of the costs of said
26 actions and of said indebtedness, the surplus, if any, being ordered paid to this answering defendant.

This answering defendant, Rosewell E. Messenger, further says that said judgment and decree of the Court of Common Pleas of Lucas county, Ohio, remains unreversed and in full force and effect; that his title and the title of said Peter Anderson, the plaintiff in the above entitled action, to the real estate, the recovery of which is sought herein, and all the facts relating thereto, are the same as the respective titles of this answering defendant and said Peter Anderson to the real estate the title to which was adjudicated in said actions Nos. 55,794 and 55,795 in said Court of Common Pleas of Lucas county, Ohio; and that all the facts relating thereto were the same as the fact relating to the real estate described in the petition in the above entitled action; and that in said actions in said State Court were involved the same questions of fact and law as are involved in this action; and that by reason thereof said plaintiff, Peter Anderson, is estopped, barred and enjoined from asserting and maintaining the several causes of action set forth in the petition in the above entitled action.

Wherefore, this answering defendant prays that the petition herein may be dismissed, and that he may recover his costs herein expended.

O. B. SNIDER,
CLAYTON W. EVERETT,
KING & TRACY,
Attorneys for Defendant.

STATE OF OHIO,
Lucas County, ss:

Rosewell E. Messenger, being first duly sworn, upon his oath says that he is the defendant in the above entitled action, and that the facts stated in the foregoing amended and supplemental answer filed by him, are true as he verily believes.

ROSEWELL E. MESSENGER.

Sworn to before me and subscribed in my presence this 18th day of February, 1908.

FRANK W. CAUGHLING,
[SEAL.] *Notary Public, Lucas County, Ohio.*

(Endorsement:) No. 1897. United States Circuit Court, Northern District of Ohio, Western Division. Peter Anderson vs. Rosewell E. Messenger. Amended and Supplemental Answer. Filed February 21, 1908. Irvin Belford, Clerk United States Circuit Court, Northern District of Ohio. King & Tracy, Attorneys.

27 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Reply to Amended and Supplemental Answer.

Now comes the plaintiff, and for reply to the amended and supplemental answer of the defendant, says:

That he admits that he brought an action in the Court of Common Pleas of Lucas county, Ohio, on or about August 27, 1905, being case No. 53,924, for the purpose of securing the possession of certain real estate. He avers that said real estate is not the same real estate as that described in his petition filed herein. Plaintiff says that said suit was carried by him on error to the Supreme Court of the state of Ohio, where the same is now pending, and that said suit has not been fully determined.

Plaintiff admits that the United States Mortgage & Trust Company, on October 25, 1906, commenced two separate actions in the Court of Common Pleas, of Lucas county, Ohio, for the purpose of foreclosing mortgages which it alleged had been executed by the defendant, Messinger, to it and made this plaintiff and one Emily O. Butler parties defendants in said actions and sought to have determined in said actions the validity of this plaintiff's title to the property described in plaintiff's petition filed herein.

Plaintiff says that said actions were brought by said Trust Company in consummation of a conspiracy entered into by said Trust

Company and the defendant Messinger and the said Emily O. Butler, for the purpose of retrying in the said State Court the validity of the title of plaintiff to the property described in his petition filed herein, and for the purpose of defeating the jurisdiction of this court over the property described in this suit. That prior to the commencement of said actions by said Trust Company this case had been heard by the Circuit Court of Appeals, of the United States, for the Sixth Circuit and said court had held, determined and adjudicated that this plaintiff was the owner of said property and that this defendant had no interest or title thereto. That the said Emily O. Butler at all times since the commencement of this suit has been represented in this suit by an attorney and has participated in the defense of this suit and should be bound by the results of this suit.

Plaintiff says, that the said Emily O. Butler filed her answers and cross petitions in said actions she brought by said Trust Company in said state court and averred therein that she had a lien on the property described in said actions and asked that the same be foreclosed.

28 Plaintiff further says, that prior to the trial of the said actions he offered to pay to the said Trust Company and Emily O. Butler the full amount due each of them upon the several mortgages claimed to be owned by them and to pay all of the costs of said actions. That each of said parties refused to accept the amount due them on said mortgages and refused to permit the plaintiff to pay the costs in said actions and have the same discontinued.

Plaintiff denies each and every other allegation in said amended answer contained, except such as are herein admitted.

PETER ANDERSON
By R. P. CARY,
C. H. TRIMBLE,
C. A. THATCHER,
His Attorneys.

STATE OF OHIO,
Lucas County, ss:

Rhea P. Cary, being duly sworn, says that he is one of the attorneys for plaintiff, who is a non-resident and is now absent from the state of Ohio. That the allegations contained in the foregoing reply are true as he verily believes.

RHEA P. CARY.

Subscribed and sworn to before me this 7th day of March, 1908.

[NOTARIAL SEAL.] CHARLES A. THATCHER,
Notary Public, Lucas County, Ohio.

(Endorsement:) No. 1897. Circuit Court of the United States, for the Northern District of Ohio, Western Division. Peter Anderson vs. United States Mortgage & Trust Company, et al. Reply to amended answer. Filed March 7, 1908. Irvin Belford, clerk, United States Circuit Court, Northern District of Ohio. Charles A. Thatcher, attorney and counsellor, 1431-1434 Nicholas building, Toledo, Ohio.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Motion to Strike from Reply to Amended and Supplemental Answer.

The defendant, Rosewell E. Messinger, respectfully moves the court for several and separate orders directing that each of the following parts and portions of the reply filed herein by plaintiff March 7, 1908, to defendant's amended and supplemental answer, be stricken therefrom.

The following allegations contained in the second paragraph of said reply, viz.:

29 1. "He avers that said real estate is not the same real estate as that described in his petition filed herein."

2. "Plaintiff says that said suit was carried by him on error to the Supreme Court of the state of Ohio, where the same is now pending."

3. "and that said suit has not been fully determined."

The following allegations contained in the fourth paragraph of said reply, viz.:

4. "Plaintiff says that actions were brought by said Trust Company in consummation of a conspiracy entered into by said Trust Company and the defendant Messenger and the said Emily O. Butler, for the purpose of retrying in the said state court the validity of the title of plaintiff to the property described in his petition filed herein."

5. "and for the purpose of defeating the jurisdiction of this court over the property described in this suit."

6. "That the said Emily O. Butler at all times since the commencement of this suit has been represented in this suit by an attorney and has participated in the defense of this suit — should be bound by the results of this suit."

The following allegations comprising the fifth paragraph of said reply, viz.:

7. "Plaintiff says, that the said Emily O. Butler filed her answers and cross-petitions in said actions she brought by said Trust Company in said state court and averred therein that she had a lien on the property described in said actions and asked that the same be foreclosed."

The following allegations contained in the sixth paragraph of said reply, viz.:

8. "Plaintiff further says, that prior to the trial of the said actions, he offered to pay to the said Trust Company and Emily O. Butler the full amount due each of them upon the several mortgages

claimed to be owned by them and to pay all of the costs of said action. That each of said parties refused to accept the amount due them on said mortgages and refused to permit the plaintiff to pay the costs in said actions and have the same discontinued."

By C. W. EVERETT,
O. B. SNIDER,
KING, TRACY,
CHAPMAN & WELLES,
Attorneys for the Defendant, Rosewell E. Messenger.

(Endorsement:) No. 1897. United States Circuit Court, Northern District of Ohio, Western Division. Peter Anderson vs. Rosewell E. Messenger. Motion to Strike from Reply to Amended and Supplemental Answer. Filed May 22, 1908. Irvin Belford, Clerk, United States Circuit Court, Northern District of Ohio. King, Tracy, Chapman & Welles, attorneys.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Motion.

The defendant, Rosewell E. Messenger, respectfully represents to the court that since the filing of his amended and supplemental answer to the petition herein, certain final proceedings upon the merits have been had in the Circuit Court of Lucas county, Ohio, in the consolidated cases in said pleading described as Nos. 55,794 and 55,795, originally begun in the court of Common Pleas of Lucas county, Ohio, which defendant, is advised by his counsel, should be pleaded herein by way of supplement to the third defense of his amended and supplemental answer heretofore filed herein, in order that all the facts relating to and necessary to sustain said defense may be fully set forth; and in furtherance of justice, defendant moves the court for an order granting him leave to file a supplement to the third defense of his amended and supplemental answer, setting forth said facts.

Defendant submits herewith a draft of said supplemental pleading duly verified.

By C. W. EVERETT,
O. B. SNIDER,
KING, TRACY,
CHAPMAN & WELLES,
Attorneys for the Defendant Rosewell E. Messenger.

(Endorsement:) No. 1897. In the Circuit Court of the United States, Northern District of Ohio, Western Division. PePter An-

derson vs. Rosewell E. Messenger. Motion. Filed June 1, 1908. Irvin Belford, clerk, United States Circuit Court, Northern District of Ohio. C. W. Everett, O. B. Snider, King, Tracy, Chapman & Welles attorneys.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Motion.

The defendant, Rosewell E. Messenger, respectfully represents to the court as follows:

31 That the proceedings in error presented by Peter Anderson, plaintiff herein, to reserve the judgment of the Court of Common Pleas, of Lucas county, Ohio, in favor of this defendant in cause No. 53,924 therein, entitled Peter Anderson plaintiff vs. The United Realty Company, Rosewell E. Messenger, et al., defendants, set forth in the 2nd defense of defendant's amended and supplemental answer, herein, was on May 29, 1908, heard by and submitted to the Supreme Court of Ohio, and in the usual course will probably be decided within a short time.

That as fully appears from the allegations set forth in the third defense of defendant's amended and supplemental answer herein, the consolidated actions therein described as Nos. 55,794 and 55,795 in the Common Pleas Court of Lucas county, Ohio, are suits in equity wherein by the decree of said court, the title of said defendant and cross-petitioner, Rosewell E. Messenger, to all of the premises in controversy in the above entitled action has been quieted against all claims asserted thereto by the plaintiff herein, Peter Anderson, including the claims thereto sought to be maintained by him herein; and by said decree said Peter Anderson has been permanently enjoined from setting up, asserting or claiming any interest, right, title or estate in or to the premises in controversy in the above entitled action, or in or to any part thereof; and that said injunction is in full force and effect.

That the finding of judgments and decree in favor of this defendant in said consolidated actions have, as to a part of the property in controversy, after hearing upon the merits, been affirmed by the Circuit Court of Lucas county, Ohio.

That at the instance and request of the plaintiff in error, Peter Anderson, and of his counsel, and by reason of no want of diligence on the part of the defendant, Rosewell E. Messenger, or of his counsel, the trial of the issues joined in said consolidated actions between said defendant and cross-petitioner therein, Rosewell E. Messenger, and said defendant therein, Peter Anderson, as to the rest of the property in controversy in said actions and comprising the property in controversy in the above entitled action, has been delayed and post-

poned so that said consolidated actions are, as to the said part of said property, for certain purposes, yet pending in said Circuit Court of Lucas county Ohio.

That said Circuit Court has entered its final findings, judgment and decree in said consolidated actions as to said part of said property in controversy therein, heard by and submitted to said court, which findings, judgment and decree are unreversed and in full force
32 and effect; that said findings judgment and decree estop and bar said Peter Anderson from maintaining his alleged causes of action against the premises made the subject of the above entitled action.

That in said consolidated actions, the state courts of Lucas county, Ohio, have acquired full and complete jurisdiction of said parties and of all the property in controversy in the above entitled action; that such jurisdiction was so acquired prior to any action being taken by this court to exercise jurisdiction, control or dominion over said property.

That in said consolidated actions, certain equitable defenses and other matters of equitable cognizance are set forth and pleaded by said defendant, Rosewell E. Messenger, against the alleged claims of said defendant, Peter Anderson, to the premises in controversy in the above entitled action; that said equitable defenses and other matters of equitable cognizance cannot be regarded or considered by this court in the above entitled action, and by reason thereof and of the decisions, findings, judgments of said decree of said state courts in said above mentioned actions, and in furtherance of justice, said defendant, Rosewell E. Messenger, respectfully moves the court for an order staying further action upon the issues joined in the above entitled action until there has been a decision by the Supreme Court of the state of Ohio, in one or both of said actions.

By C. W. EVERETT,
O. B. SNIDER,
KING, TRACY, CHAPMAN & WELLES,
Attorneys for the Defendant Rosewell E. Messenger.

STATE OF OHIO,
Lucas County, ss:

Rosewell E. Messenger, being first duly sworn, upon his oath, says that he is the defendant in the above entitled action, and that the facts stated in the foregoing motion are true.

ROSEWELL E. MESSENGER.

Sworn to before me and subscribed in my presence this 2nd day of June, 1908.

[Notarial Seal.] GEORGE D. WELLES,
Notary Public, Lucas County, Ohio.

(Endorsement:) No. 1897. United States Circuit Court, Northern District of Ohio, Western Division. Peter Anderson vs. Rosewell E. Messenger. Motion to stay. Filed June 2, 1908. Irvin Bel-
33 ford, Clerk, United States Circuit Court, Northern District of Ohio. C. W. Everett, O. B. Snider, King, Tracy, Chapman & Welles, attorneys.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Supplement to Third Defense of Amended and Supplemental Answer.

Leave of court thereunto having been first duly obtained, now comes the defendant, Rosewell E. Messenger, and by way of supplement to the third defense of his amended and supplemental answer to the petition heretofore filed herein, says:

He adopts and reaffirms each and all of the allegations in said third defense contained, as fully and completely as though same were here repeated, waiving none of the defenses set forth in said amended and supplemental answer, but insisting thereon.

Defendant further says that on or about July 1, 1907, Peter Anderson, the defendant in said consolidated actions numbered 55,794 and 55,795, in the Court of Common Pleas of Lucas County, Ohio, appealed said actions from said court to the Circuit Court of Lucas county, Ohio, said Circuit Court being a court of general jurisdiction; that on March 9, 1908, said consolidated causes upon the issues found by the pleadings filed therein in said Court of Common Pleas, came regularly on for trial before said Circuit Court of Lucas county, Ohio, upon said appeal by the defendant, Peter Anderson; that thereupon said defendant was, by said court, duly granted leave to file and filed an amendment to his several answers theretofore filed in said actions, setting up in each of said amendments to said answers as a defense to the claims asserted therein by the petitioner, United States Mortgage & Trust Company, and the defendants and cross-petitioners, Emily O. Butler and Rosewell E. Messenger, respectively, the several judgments of reversal entered in the above entitled action by the Circuit Court of Appeals of the United States, for the Sixth Circuit, rendered June 5, 1906, and December 3, 1907, respectively, alleging and claiming in each of said amendments to said several answers that by reason of said several proceedings had in said United States Courts, the title to the property involved in said consolidated actions had been adjudicated and determined and adjudged to be in said defendant, Peter Anderson; and that all parties
34 thereto were estopped from denying and disputing the effect thereof.

That thereupon said defendant, on application to said court therefor, was granted leave to withdraw and withdraw all of the answers and amendments thereto theretofore filed by said defendant, in said consolidated actions to the petition of said plaintiff, United States Mortgage & Trust Company, and to the answer and cross-petition of the defendant and cross-petitioner, Emily O. Butler, and was also granted leave to file and filed separate demurrers to said petition and to said answer and cross-petition based upon special and general

grounds, and being the same demurrer theretofore filed to said pleadings in said court of Common Pleas; that thereupon each of said demurrers was duly argued by counsel and submitted to the court; and the court being fully advised in the premises, on consideration overruled each of said demurrers.

That thereupon the defendant, Peter Anderson, duly obtained leave to refile and refiled the answer and the amendment thereto originally filed by him in the Court of Common Pleas to the petition of said plaintiff, and the above mentioned amendment to said answer filed in said Circuit Court of Lucas county, Ohio, and the answer and the amendment thereto originally filed by him in the Court of Common Pleas to the answer and cross-petition of the defendant and cross-petitioner, Emily O. Butler, and the above mentioned amendment to said answer filed in said Circuit Court of Lucas county, Ohio; it being further ordered by said court that the several replies to said pleadings of said defendant Peter Anderson, filed by said plaintiff, United States Mortgage & Trust Company, and said defendant and cross-petitioner, Emily O. Butler, respectively, in said Court of Common Pleas, should be regarded as re-filed in said Circuit Court of Lucas county, Ohio.

That thereupon said plaintiff, United States Mortgage & Trust Company, filed a general demurrer to said amendment to answer of said defendant, Peter Anderson, filed in said action in said Circuit Court of Lucas county, Ohio; and the defendant and cross-petitioner, Emily O. Butler, filed her reply therein to said amendment to answer of said defendant, Peter Anderson, to her said cross-petition.

That thereupon said demurrer of said plaintiff, United States Mortgage & Trust Company, to said amendment to answer of said defendant, Peter Anderson, filed in said Circuit Court of Lucas
35 county, Ohio, was argued by counsel and submitted to the court; and the court being fully advised in the premises, on consideration sustained said demurrer, and thereafter said defendant, Peter Anderson, not pleading further, said court duly entered its judgment in said action upon the issue made and presented by said general demurrer with respect to the effect of said several judgments of reversal, in favor of said plaintiff, United States Mortgage & Trust Company, and against said defendant, Peter Anderson; and that said judgment remains in full force and effect.

That upon said trial in said Circuit Court of Lucas county, Ohio, said defendant, Peter Anderson, moved the court for leave to withdraw and withdrew all of his answers and amendments thereto, theretofore filed by him in said consolidated actions, to the amended and supplemental answers and cross-petitions therein of the defendant and cross-petitioner, Rosewell E. Messenger, the defendant herein, and obtained leave to file and filed a general demurrer to said amended and supplemental answers and cross-petitions of said defendant, Rosewell E. Messenger. That thereupon said demurrer was argued by counsel and submitted to the court, and the court, being fully advised in the premises, on consideration, overruled said demurrer.

That thereupon said defendant, Peter Anderson, was granted leave

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to refile and refiled the answers and the amendments thereto originally filed by him in said Court of Common Pleas of Lucas county, Ohio, to said amended and supplemental answers and cross-petitions of said defendant and cross-petitioner, Rosewell E. Messenger, and the amendment to said answers filed in said Circuit Court of Lucas county, Ohio; it being ordered by said Circuit Court of Lucas county, Ohio, that the several replies to the pleadings of said defendant, Peter Anderson, filed by said defendant and cross-petitioner, Rosewell E. Messenger in said Court of Common Pleas, should be regarded as refiled in said Circuit Court; and on March 11, 1908, said defendant and cross-petitioner, Rosewell E. Messenger, filed a reply to said amendment to said amended answer of said defendant Peter Anderson, filed in said Circuit Court of Lucas county, Ohio, thereby joining issue with said defendant, Peter Anderson.

This answering defendant further says that said consolidated actions were duly heard on the merits by, and on March 13, 1908, were submitted to said Circuit Court of Lucas county, Ohio, upon the issues joined upon said pleadings in said actions between said plaintiff, United States Mortgage & Trust Company, and the defendants, Emily O. Butler and Peter Anderson; and that thereafter at the same term, said Circuit Court duly entered its findings, judgment and decree upon said issues joined in favor of said plaintiff, United States Mortgage & Trust Company, and in favor of said defendant and cross-petitioner, Emily O. Butler, and against said defendant, Peter Anderson, the amount due said plaintiff and said defendant and cross-petitioner, respectively, being thereby fixed, and said mortgaged premises ordered sold and the proceeds applied in satisfaction of the costs of said action and of the claims of said parties, the surplus, if any, to be brought into said Circuit Court to abide its further order.

This answering defendant further says that said consolidated actions were also duly heard on the merits by, and on March 13, 1908, were submitted to said Circuit Court, of Lucas county, Ohio, upon the issues joined upon said pleadings in said actions between said defendant and cross-petitioner, Rosewell E. Messenger (the defendant herein), and said defendant, Peter Anderson, (the plaintiff herein), so far as same relate to the following premises:

All of lot nineteen (19) in the Vistula division of the city of Toledo, Lucas county, Ohio, except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof, and the improvements, privileges and appurtenances thereunto belonging; said premises having a frontage of fourteen (14) feet on Lynn street, and extending northeasterly therefrom at a like width to a depth of eighty (80) feet.

Also, the southeast nineteen (19) feet of the southeast eighty (80) feet of lot twenty-one (21) in the Vistula Division of the city of Toledo, Lucas county, Ohio, and the improvements, privileges and appurtenances thereunto belonging; said premises having a frontage of nineteen (19) feet on Lynn street and extending northeasterly therefrom at a like width to a depth of eighty (80) feet.

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This answering defendant further says that thereafter on or about April 4, 1908, said Circuit Court duly entered its finding, judgment and decree upon said issues joined as to said parts of said lots, and thereby found and decreed that said defendant and cross-petitioner, Rosewell E. Messenger, the defendant herein), is in equity the owner in fee simple of said parts of said lots, and is entitled to have his title thereto quietd as against said defendant, Peter Anderson, and to have a release, discharge and conveyance from said Peter Anderson, of any and all estate, claim, interest, lien or title which he has or claims to have in, to or against said parts of said lots; that a certain instrument executed by Edson Allen, master commissioner, to Henry Anderson, dated November
37 18, 1844, recorded in Volume 10 at page 168 and following of the records of deeds of Lucas county, Ohio, was in fact, as to Charles Butler, who was then the owner of said above described property, a mortgage, and such title as said Henry Anderson took to said property by virtue of said instrument, was taken and held by him in trust as security for the payment of the indebtedness evidenced by note dated July 1, 1841, for $20,000.00, described in the amended and supplemental answers and cross-petitions filed by said defendant and cross-petitioner, Rosewell E. Messenger, in said consolidated actions, and being the indebtedness then owing by said Charles Butler to said Henry Anderson, and for no other purpose; that thereafter said Charles Butler duly paid to said Henry Anderson, and to the executors of his said estate, said debt in full, and that said executors of said Henry Anderson duly released and discharged said Charles Butler from any and all claims which the estate of said Henry Anderson had theretofore held against him, and conveyed all of the title therefore held by said Henry Anderson, and by them, as his said executors, in and to said property to the said Charles Butler, and forever released and discharged said Charles Butler from any and all debts, claims and demands of every kind which said Henry Anderson or his said executors had theretofore held or owned against said Charles Butler.

This answering defendant, Rosewell E. Messenger, further says that said Circuit Court of Lucas county, Ohio, as a part of said decree in said consolidated actions, upon said issues further ordered, adjudged and decreed that within three days from the 4th day of April, 1908, said Peter Anderson should execute and deliver to said Rosewell E. Messenger, a proper deed of release and quit claim of any and all such claim, interest, lien or title of said Peter Anderson in or to said parts of said lots, and each and every part thereof, and the improvements, privileges and appurtenances thereunto belonging, and that in default thereof, said decree should operate as such conveyance; that the title of said Rosewell E. Messenger, this answering defendant, to said parts of said lots was thereby quieted as against said Peter Anderson, and any and all persons claiming under him, and said Peter Anderson was especially barred and forever enjoined from setting up, asserting or claiming any claim, interest, lien, right, title or estate in or to said premises, or any part thereof.

This answering defendant, Rosewell E. Messenger, further says

that by the terms of said decree, it was further ordered that the matters in controversy in said consolidated actions between
38 said Rosewell E. Messenger and said Peter Anderson, with respect to the part of said premises in controversy therein other than said parts of said lots nineteen (19) and twenty-one (21), should be and were reserved by said court for further hearing, consideration and decision, with leave to any of the parties to said consolidated actions to make such further application to said court for the due protection and preservation of their rights as might be necessary.

This answering defendant, Rosewell E. Messenger, further says that said findings, judgment and decree of said Circuit Court of Lucas county, Ohio, remain unreversed and in full force and effect; that his title and the alleged title of said Peter Anderson, plaintiff in the above entitled action, to the real estate, the recovery of which is sought herein, and all the facts relating thereto, are the same as the title of this answering defendant and the alleged title of said Peter Anderson to the parts of said lots nineteen (19) and twenty-one (21) in the Vistula Division of the city of Toledo, Lucas county, Ohio, the title to which was finally adjudicated as aforesaid in said consolidated actions by said Circuit Court of Lucas county, Ohio; that all of the facts relating thereto are the same as the facts relating to the real estate described in the petition in the above entitled action; that in said actions in said state court were involved the same questions of fact and law as are involved in this action; that said questions were by said court fully determined and finally adjudicated in favor of this answering defendant; and that by reason thereof, said plaintiff, Peter Anderson, is forever estopped, barred and enjoined from asserting and maintaining the several causes of action set forth in the petition in the above entitled action.

Wherefore, this defendant prays that the petition herein may be dismissed, and that he may recover his costs herein expended.

By C. W. EVERETT,
O. B. SNIDER,
KING, TRACY,
CHAPMAN & WELLES,
Attorneys for the Defendant
Rosewell E. Messenger.

STATE OF OHIO,
Lucas County, ss:

Rosewell E. Messenger, being first duly sworn, upon his oath says that he is the defendant in the above entitled action, and that the facts stated in the foregoing supplement to the third defense of the amended and supplemental answer filed by him therein, are true as he verily believes.

ROSEWELL E. MESSENGER.

39 Sworn to before me and subscribed in my presence this 2nd day of June, 1908.

[NOTARIAL SEAL.] GEORGE D. WELLES,
Notary Public, Lucas county, Ohio.

(Endorsement:) No. 1897. United States Circuit Court, for the Northern District of Ohio, Western Division. Peter Anderson vs. Rosewell E. Messenger. Supplement to third defense of amended and supplemental answer. Filed June 2, 1908. Irvin Belford, clerk, United States Circuit Court, Northern District of Ohio. King, Tracy, Chapman & Welles, attorneys.

In the Circuit Court of the United States, for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Reply to the Supplement to the Third Defense of the Amended and Supplemental Answer of the Defendant.

For reply to the defendant's supplement to the third defense of his amended and supplemental answer, heretofore filed herein, plaintiff says that he admits that the pleadings mentioned and described in said supplement were filed as therein stated, but for the contents, averments and allegations thereof, plaintiff demands a production of the record.

Plaintiff denies each and every other allegation in said supplement to the third defense of defendant's amended and supplemental answer contained.

PETER ANDERSON,
By R. P. CARY,
C. H. TRIMBLE,
C. A. THATCHER,
His Attorneys.

STATE OF OHIO,
Lucas county, ss:

Rhea P. Cary, being duly sworn, says that he is one of the attorneys for the plaintiff in the above entitled action; that the plaintiff is a non-resident of and now absent from the state of Ohio; that the allegations contained in the foregoing reply are true, as he verily believes.

RHEA P. CARY.

Subscribed and sworn to before me this 2nd day of June, 1908.

[SEA.] JOHN W. WASHBURN,
Notary Public, Lucas County, Ohio.

(Endorsement:) No. 1897. United States Circuit Court, for the Northern District of Ohio, Western Division. Peter Anderson,

plaintiff, vs. Rosewell E. Messenger, defendant. Reply to
40 the supplement to the third defense of the amended and supplemental answer of the defendant. Filed June 2, 1908. Irvin Belford, clerk of United States Circuit Court, for the Northern District of Ohio. Charles A. Thatcher, attorney and counsellor, 1431-1434 Nicholas building, Toledo, Ohio.

In the Circuit Court of the United States, for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Amendment to Petition.

Now comes the plaintiff and by leave of court first had and obtained, files this his amendment to his petition and says that he has been damaged by the wrongful detention of the property described in plaintiff's petition, in the sum of fourteen thousand dollars, prior to the commencement of this action, and that defendant has received the rents and profits of said property, amounting to the sum of $14,000, prior to the commencement of this action.

Wherefore plaintiff prays judgment against the defendant in the said sum of $14,000.

PETER ANDERSON,
By R. P. CARY,
C. H. TRIMBLE,
C. A. THATCHER,
His Attorneys.

STATE OF OHIO,
Lucas county, ss:

C. A. Thatcher, being duly sworn, says that he is one of the attorneys for the plaintiff in this action; that plaintiff is a non-resident of and now absent from the state of Ohio; that the allegations contained in the above amendment are true, as he verily believes.

C. A. THATCHER.

Subscribed and sworn to before me this 2nd day of June, 1908.
[SEAL.] ALONZO G. DUER,
Notary Public, Lucas county, Ohio.

(Endorsement:) No. 1897. In the United States Circuit Court, Northern District of Ohio, Western Division. Peter Anderson, plaintiff vs. Rosewell E. Messenger, defendant. Amendment to petition. Filed June 2, 1908. Irvin Belford, clerk, United States Circuit Court, Northern District of Ohio. Charles A. Thatcher, attorney and counsellor, 1431-1434 Nicholas building, Toledo, Ohio.

41 June term, A. D., 1908, to-wit, June 2, 1908.

Present the Honorable Robert W. Tayler, United States District Judge.

No. 1897. Law.

PETER ANDERSON,
vs.
ROSEWELL E. MESSENGER.

This day came the parties by their attorneys, and thereupon *came* this cause came on to be heard upon the defendant's motion for several and separate orders directing that the parts and portions of the reply filed herein by the plaintiff, March 7, 1908, to defendant's amended and supplemental answer, numbered respectively 1, 2, 3, 4, 5, 6, 7 and 8, be stricken therefrom, on consideration whereof, the court do overrule said motion to strike out to the action of the court in so overruling said motion to strike out, defendant by his counsel, excepts. And thereupon this cause came on further to be heard upon the motion of the defendant for an order granting him leave to file a supplement to the third defense of his amended and supplemental answer heretofore filed herein. On consideration whereof the court do grant such leave to file said supplement, to which order of the court the plaintiff by his attorneys, excepts, and thereupon said supplement to the third defense of the amended and supplemental answer was filed.

And thereupon this cause came on further to be heard upon the motion of defendant for an order staying further action upon the issues joined in this cause until there has been a decision by the Supreme Court of the state of Ohio in one or both of the actions referred to in said motion, now pending and undisposed of in said Supreme Court of Ohio, and the Circuit Court of Lucas county, Ohio. On consideration whereof the court do overrule said motion to stay proceedings. To the action of the court in so overruling said motion the defendant duly excepts.

And this cause now coming on to be heard upon the issues joined between the parties, came a jury, to-wit: Amos Ballmer, Jesse A. Demuth, Albert Elliott, Fenton W. Fish, Jacob C. Guiss, Jacob Hornung, Noah Lee, Robert A. Longheed, A. C. Noble, James T. Robinson, William N. Sidlinger, George Simmons, and said jury having been duly impaneled and sworn, and having heard the evidence on behalf of said plaintiff; and the evidence on behalf of the defendant and the evidence on part of plaintiff in rebuttal, the plaintiff moved to amend the petition to allege that rents accrued before suit brought, to the extent of fourteen thousand dollars, in accordance with the proof, and to amend the prayer thereof so as to pray for judgment for rents and profits, accrued before
42 suit brought to fourteen thousand dollars, to which defendant objected, but which was granted by the court to which defendant excepted.

And the court having heard the arguments of counsel on motion

by plaintiff, duly objected to by defendant, directed the jury to return a verdict for the plaintiff, finding that said plaintiff is entitled to the possession of the property described in the petition of the plaintiff and assessing his damages for the wrongful withholding of the possession of such property at the sum of forty six thousand nine hundred and four dollars, to which order and directions of the court defendant by his attorneys excepts and thereupon said jury, in purusuance of said direction by the court, returned their verdict in writing signed by their foreman, which reads and is in the words following, to-wit:

"We, the jury, in this case, being duly impaneled and sworn, do find upon the issues joined, for the plaintiff, and find that he is entitled to the possession of the property, described in the petition of the plaintiff, and do assess his damages at forty-six thousand nine hundred and four and 00-100 ($46,904.00) dollars, for the wrongful withholding of such possession.

ALBERT ELLIOTT,
Foreman."

It is therefore considered and adjudged by the court that the said Peter Anderson recover from the said Rosewell E. Messenger, the title and possession of the real property described in the petition, to-wit: Lots numbered twenty (20), twenty-one (21), except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof, thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), ten hundred and eight (1,008), and ten hundred and nine (1,009), all in the Vistula Division of the city of Toledo, county of Lucas, state of Ohio, according to the verdict heretofore rendered herein, and also the said sum of forty-six thousand nine hundred and four dollars ($46,904.00) damages as assessed, by said verdict, together with his costs herein expended, for all of which execution and writ of possession shall issue, to which verdict and the judgment thereon defendant duly excepted.

And thereupon came the defendant, Rosewell E. Messenger and duly gave notice to, and moved the court for leave to file his written application herein for the valuation of improvements and assessment of damages and of all other benefits under and within the provisions of the statutes of Ohio, for the relief of occupying claimants, upon the premises in said foregoing judgment described; and thereupon the court on consideration, granted defendant leave
63 to file such application herein within ten days, and until the further order of the court, no execution or writ of possession shall issue upon the foregoing judgment.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Motion for New Trial.

The defendant, Rosewell E. Messenger, moves the court for an order to vacate and set aside the verdict and judgment heretofore rendered herein, and grant defendant a new trial of said cause, for the following reasons:

1. Because of error in the assessment of the amount of recovery, same being too large.

2. Because the court admitted evidence of, and allowed plaintiff to recover for, the value and amount of the rents of the premises in controversy, for time subsequent to the commencement of said action, to which action of the court said defendant then duly excepted.

3. Because said verdict is not sustained by sufficient evidence and is contrary to law.

4. Because said judgment is not sustained by sufficient evidence and is contrary to law.

5. Because the court admitted evidence offered by the plaintiff upon the trial of said cause against the objection of the defendant, to which action of the court said defendant then duly excepted.

6. Because the court excluded evidence offered by the defendant upon the trial of said cause, to which action of the court said defendant then duly excepted.

7. Because the court erred in granting plaintiff's motion for the direction of a verdict in his favor, to which action of the court the defendant then duly objected and excepted.

8. Because of other errors of law which occurred upon the trial of said cause, to each and all of which errors said defendant then duly excepted.

By C. W. EVERETT,
O. B. SNIDER, AND
KING, TRACY, CHAPMAN & WELLES,
Attorneys for Defendant, Rosewell E. Messenger.

(Endorsement:) No. 1897. United States Circuit Court, Northern District of Ohio, Western Division. Peter Anderson vs. Rosewell E. Messenger. Motion for new trial. Filed June 3, 1908. Irvin Belford, clerk United States Circuit Court, Northern District of Ohio. O. B. Snider, C. W. Everett, King, Tracy, Chapman & Welles, attorneys.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Motion.

Defendant respectfully represents that he has filed a motion to vacate and set aside the verdict returned and judgment entered herein at this term, and should the court deny said motion defendant expects and intends to take the necessary steps to review said judgment upon writ of error; that should the court grant said motion it will not be necessary for defendant to take further steps to protect his rights to the benefits under the statutes relating to occupying claimants, and in furtherance of justice he mooves the court to extend its order staying the issuance of a writ of possession and a writ of execution herein, and the time by which defendant shall file his application for the benefits of the statutes applicable to occupying claimants, until the court has passed upon defendant' motion for a new trial herein.

C. W. EVERETT,
O. B. SNIDER,
KING, TRACY, CHAPMAN & WELLES,
Attorneys for Defendant.

(Endorsement:) No. 1897. In the Circuit Court of the United States, for the Northern District of Ohio, Western Division. Peter Anderson, plaintiff, vs. Rosewell E. Messenger, defendant. Motion. Filed June 10, 1908. Irvin Belford, clerk United States Circuit Court, Northern District of Ohio. King, Tracy, Chapman & Welles, attorneys.

June Term, A. D. 1908, to wit, June 10, 1908.

Present: The Honorable Robert W. Tayler, United States District Judge.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Order.

On motion of defendant and for good cause shown, it is hereby ordered that the former order of this court staying the issuance of a writ of possession and writ of execution herein and fixing the time by which defendant may file his application for the benefits of the

45 statutes applicable to occupying claimants, be and are, severally extended and continued in effect until 3 days after the court has ruled upon defendant's motion for new trial.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division, June Term, A. D. 1908, to wit, September 15, 1908.

Present: The Honorable Robert —— ——, — States District Judge.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Journal Entry.

This day duly came on for hearing the motion of the defendant, Rosewell E. Messenger, for an order vacating and setting aside the verdict and judgment heretofore rendered herein and granting said defendant a new trial of this cause; and said motion having been argued by counsel and duly submitted, the court, on consideration, being fully advised in the premises finds that said verdict and judgment rendered thereon herein against said defendant for rents and profits, are each excessive in the sum of twenty thousand, four hundred, four and 11/100 dollars ($20,404.11); and that said verdict and judgment should have been for the sum of twenty-six thousand, five hundred dollars ($26,500.00) and no more, with interest from the 2nd day of June, 1908, the first day of the present term of this court; and that unless plaintiff shall remit said excessive amount of said judgment, defendant's said motion should be granted, but that in case said remittitur should be made, said motion should be denied; to which decision and findings the defendant, Rosewell E. Messenger, by his counsel then and there duly excepted.

And thereupon came the plaintiff, in open court by his attorneys, and remitted from said judgment in his favor said sum of $20,404.11, leaving the amount of said judgment $26,500.00 with interest from June 2, 1908.

And thereupon, it was ordered and adjudged by the court that said motion of defendant for an order vacating and setting aside said verdict and judgment be, and the same hereby is denied and overruled; to which decision and ruling of the court, the defendant, Rosewell E. Messenger, by his counsel then and there duly excepted.

And thereupon, on motion of the defendant, Rosewell E. Messenger, therefor, the court duly granted said defendant until and including September 15, 1908, to prepare, present to the court and have allowed, signed, sealed, and filed a bill of exceptions herein.

And, on motion of defendant and for good cause shown, it is hereby further ordered that the former order of this court fixing

the time within which defendant may file his application
46 for the benefits of the statutes applicable to occupying claimants be and is hereby extended and continued in effect until and including September 15, 1908; and it is further ordered that the former order of this court staying the issuance of a writ of possession and writ of execution herein be and is extended and continued in effect until thirty (30) days after final hearing has been had in said court upon said application.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

PETER ANDERSON, Plaintiff.
vs.
ROSEWELL E. MESSENGER, Defendant.

Stipulation.

It is hereby stipulated by and between the parties to the above entitled cause, by their respective attorneys, that to avoid unnecessary expense, none of the exhibits attached to and made part of the bill of exceptions filed herein September 15, 1908, shall be copied upon the records in said cause, said bill of exceptions without said exhibits including all of the parts of said exhibits necessary to a determination of the questions to be presented for the review of the proceedings and judgment herein upon proceedings in error to the Circuit Court of Appeals, and for the purpose of such proceedings in error, said exhibits shall be given the same force and effect in all respects as though copied in full upon said records.

In witness whereof, said parties have executed this stipulation, by their respective attorneys, this 15th day of September, 1908.

PETER ANDERSON, *Plaintiff.*
By R. P. CARY,
C. H. TRIMBLE,
C. A. THATCHER,
His Attorneys.
ROSEWELL E. MESSENGER, *Defendant.*
By KING, TRACY, CHAPMAN & WELLES,
C. W. EVERETT,
O. B. SNIDER,
His Attorneys.

(Endorsement:) United States Circuit Court, Northern District of Ohio, Western Division. Peter Anderson vs. Rosewell E. Messenger. Stipulation. Filed September 15, 1908. Irvin Belford, Clerk United States Circuit Court, Northern District of Ohio. King, Tracy, Chapman & Welles, C. W. Everett & O. B. Snider, Attorneys.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

47 PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Defendant's Bill of Exceptions.

Be it remembered that in the above entitled cause in the Circuit Court of the United States for the Northern District of Ohio, Western Division, at the June, A. D. 1908, term thereof, before the Honorable Robert W. Tayler, judge thereof, presiding, the following proceedings were had, viz:

On June 2, 1908, the written motion of the defendant, duly verified and this day filed herein, for an order staying further proceedings in the above entitled action for the reasons set forth in said motion, duly came on for hearing; and thereupon said motion was offered and read in evidence, same being hereto attached, marked "Exhibit A," and hereby made part of this bill of exceptions.

Thereupon the defendant, in support of said motion, offered and read in evidence duly certified transcript of the proceedings and final record in the Court of Common Pleas of Lucas county, Ohio, in cause No. 53,924 therein, entitled Peter Anderson, plaintiff, vs. The United Realty Company, Rosewell E. Messenger, et al., defendants, said certified transcript being hereto attached, marked "Exhibit B," and hereby made part of this bill of exceptions.

Thereupon the defendant, further in support of said motion, offered and read in evidence printed copy of record in the Supreme Court of the state of Ohio, in proceedings in error No. 10,689 therein, entitled Peter Anderson (plaintiff in error, vs. The United Realty Company, Rosewell E. Messenger, et al., defendants in error, being proceedings pending in said court to reverse the judgment of said Court of Common Pleas in said cause No. 53,924, entitled Peter Anderson, Plaintiff, vs. The United Realty Company, Rosewell E. Messenger, et al., defendants, and printed copy of record being hereto attached, marked "Exhibit C," and hereby made part of this bill of exceptions, and is a true, full and correct copy of said proceedings.

Thereupon it was duly stipulated in open court by and between counsel for the respective parties to the above entitled action, that said copy of said record of said proceedings in the Supreme Court might be offered and read in evidence in support of said motion with the same force and effect as though duly certified for use as evidence in accordance with the act of congress in such cases made and provided.

Thereupon the defendant, further in support of said motion, offered and read in evidence duly certified transcript of the pro-
48 ceedings and final record in the Court of Common Pleas of Lucas county, Ohio, in cause No. 55,794 therein, entitled

United States Mortgage & Trust Company, plaintiff, vs. Peter Anderson, Rosewell E. Messenger, et al., defendants, said certified transcript being hereto attached, marked "Exhibit D," and hereby made part of this bill of exceptions.

Thereupon the defendant, further in support of said motion, offered and read in evidence duly certified transcript of the proceedings and final record in the Court of Common Pleas of Lucas county, Ohio, in cause No. 55,795 therein, entitled United States Mortgage & Trust Company, plaintiff, vs. Rosewell E. Messinger, Peter Anderson, et al., defendants, said certified transcript being hereto attached, marked "Exhibit E," and hereby made part of this bill of exceptions.

Thereupon the defendant, further in support of said motion, offered and read in evidence duly certified transcript of the proceedings and record in the Circuit Court of Lucas county, Ohio, in cause No. 2,192 therein, entitled United States Mortgage & Trust Company, plaintiff, vs. Peter Anderson, Rosewell E. Messinger, et al., defendants, consolidated with cause No. 2,193 in said court, entitled United States Mortgage & Trust Company, plaintiff, vs. Rosewell E. Messinger, Peter Anderson, et al., defendants, and being complete certified transcript of the record in said consolidated cases in said Circuit Court to and including April 4, 1908, said certified transcript being hereto attached, marked "Exhibit F," and hereby made part of this bill of exceptions.

And the foregoing was all the evidence offered or introduced by either party to said action and received upon the hearing on said motion; and thereupon the court, on consideration of said motion and said evidence hereinbefore referred to and attached to and made part of this bill of exceptions, overruled said motion, to which action of the court, the defendant then and there duly excepted; and thereupon the court ordered that the trial of said cause should proceed forthwith, to which order the defendant then and there duly excepted; and thereupon the defendant was duly granted leave within and including September 15, 1908 to file bill of exceptions with respect to the ruling of said court upon said motion and in ordering that the trial of said cause should forthwith proceed, and in accordance with said leave now tenders this bill of exceptions to said action of the court, which is approved and allowed and hereinbelow duly signed, sealed and made part of the record in this cause.

49 At the times same were offered, the plaintiff objected separately and severally to the introduction of each and every part of each of the foregoing records in said cases of Peter Anderson, vs. The United Realty Company, et al., in the Common Pleas and Circuit Courts of Lucas county, Ohio, and United States Mortgage & Trust Company, vs. Peter Anderson, et al., and United States Mortgage & Trust Company, vs. Rosewell E. Messinger, et al., in said Common Pleas and Circuit Courts of Lucas county, Ohio, upon the ground of incompetency, immateriality and irrelevancy.

Each of said objections was by the court overruled, to which action of the court the plaintiff excepted.

And be it further remembered, that on the trial of the above en-

titled cause in the Circuit Court of the United States for the Northern District of Ohio, western Division, on June 2, 1908, at the June, 1908, term thereof, before the Honorable Robert W. Tayler, judge thereof presiding and a jury duly empaneled and sworn, further proceedings were had as follows:

Plaintiff to maintain the issues upon his part offered in evidence section 1 of stipulation No. 1 herein, same being as follows, viz:

"That on the 19th day of May, A. D., 1838, at the time of the execution of the mortgage hereinafter mentioned on the land involved in this case by Edward Bissell and his wife, Jane A. M. Bissell, of the city of Toledo, Ohio, to Charles Butler, of the city and state of New York, that the said Edward Bissell was the owner in fee simple, had the legal title to and was entitled to and in the actual possession of the real estate described in said mortgage, including all of the real estate involved in this action and at the time of the execution of said mortgage there was and now is a regularly executed chain of conveyances in fee simple for said real estate from the government of the United States down to the said Edward Bissell."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the ground that all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

Thereupon the court overruled said objection, to which
50 ruling the defendant then and there duly excepted, and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said section 1 of said stipulation No. 1 hereinbefore set forth was received and read in evidence.

Plaintiff further to maintain the issues upon his part offered in evidence section 2 of stipulation No. 1 herein, same being as follows, viz:

"That on the 19th day of May, A. D., 1838, said Edward Bissell and Jane A. M. Bissell, of the city of Toledo, Ohio, signed, sealed, executed, acknowledged and delivered in due form of law to Charles Butler, of New York City, their mortgage deed of said date when and whereby they did duly grant, bargain, sell and convey to the said Charles Butler, his heirs and assigns forever in fee simple, among other lots and parcels of land, all of the real estate involved in this action to secure the payment of the bond of said Edward Bissell to the said Charles Butler executed on the same date for $21,500.00, payable at the office of the Manhattan Company, of the city of New York, within one year from the date of said mortgage, with interest at the rate of seven per cent. per annum, which mortgage was attested by two witnesses and was duly acknowledged according to law, which mortgage was after-

wards duly filed for record May 19, 1838, and recorded by the recorder of Lucas county, Ohio, on June 7, 1838, on page 267 and 269 inclusive of volume No. 2, of the public record of mortgages kept and recorded in the recorder's office of Lucas county, Ohio.

"That afterwards on September 23, A. D., 1841, the said Charles Butler made an assignment of said mortgage to said Henry Anderson in the words and figures following, to-wit, viz:

"'Assignment: I hereby assign this mortgage to Henry Anderson on certain trusts set forth in a deed this day made. September 23, 1841.

CHARLES BUTLER.'

"Which assignment was duly recorded on the margin of the record of said mortgage, in Lucas county, Ohio, on September 30, A. D., 1843."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the ground that all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

51

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said section 2 of said stipulation No. 1 hereinbefore set forth was received and read in evidence.

Plaintiff further to maintain the issues upon his part offered in evidence section 3 of stipulation No. 1 herein, same being as follows, viz:

"That on the 19th day of September, A. D. 1843, said Henry Anderson claiming to be the assignee of said mortgage executed by said Edward Bissell and wife to said Butler filed his bill in chancery in the court of common pleas of Lucas county, Ohio, on the chancery side of said court to foreclose the aforesaid mortgage; the said Henry Anderson was complainant in said action and Edward Bissell, Jane A. M. Bissell, Frederick Bissell, Sidney Bissell and Charles Butler were named as defendants in said bill; that said Henry Anderson by his said bill alleged and set forth the execution of said Edward Bissell and Jane A. M. Bissell, his wife, of the said bond and mortgage, and non-payment thereof and said bill in no way made any allegations against the said Charles Butler, except to allege the assignment of said mortgage by the said Charles Butler to the said Henry Anderson, in words and figures as follows:

"'Your orator further represents that on the 23d day of September in the year of our Lord 1841, the said mortgage and bond was

duly transferred and assigned to your orator by the said Charles Butler.'

"The only prayer or relief asked for in said bill is in the words and figures following, to-wit: viz:

"'Your orator therefore prays that the writ of subpœna may issue against the said Edward Bissell, Jane A. M. Bissell, Charles Butler, Frederick Bissell and Laverett Bissell that they may be compelled to answer all and singular the premises, that an account may be taken of what is due your orator for his principal and interest aforesaid; that said Frederick Bissell, Sidney Bissell, Charles Butler, Jane A. M. Bissell may be forever barred and foreclosed of and from all right and equity of, in and to said mortgaged premises and that your orator may have such other and further relief in the premises as equity and good conscience may require.'

"That all the defendants in said action, except Charles Butler, were either duly served with subpœna or entered their appearance in said action, but the said Charles Butler was not served
52 with subpœna or other process, and in no manner entered his appearance in said action, and the said court in said action in no manner acquired jurisdiction over said Charles Butler; that afterwards on the first day of April in the year A. D. 1844, a decree was duly entered in said action ordering the said premises to be advertised and sold according to law for the payment of the $29,139.01 found due the complainant Henry Anderson, on said bond and mortgage from the defendant Edward Bissell; and one Edson Allen, master commissioner in chancery in said court, was appointed to sell said premises, and that afterwards the said master commissioner in pursuance of the decree of the court in said action sold the real estate involved in said action including all the real estate involved in this action to the complainant Henry Anderson at the price of $6,921.00, which sale was afterwards duly confirmed by the court and the said Edson Allen as said master commissioner making said sale was ordered by said court to convey said real estate in fee simple to the said purchaser, Henry Anderson, his heirs and assigns, forever, and that afterwards on the 18th day of November, 1844, the said Edson Allen as such master commissioner in pursance of the decree rendered in said action of said sale and the confirmation thereof and in pursuance of the order of said court, did execute his master commissioner's deed to the said Henry Anderson dated the 18th day of November, 1844, whereby the said master commissioner conveyed to the said Henry Anderson, his heirs and assigns forever all the real estate involved in said action and all the real estate involved in this action, which deed was afterwards duly filed for record with the recorder of Lucas county, Ohio, and by him duly recorded on page 168 of Volume 10 of the public record of deeds, kept in the recorder's office of Lucas county, Ohio.

"That all the proceedings in said foreclosure suit were regular and legal, excepting the failure or omission to serve Charles Butler with subpœna, or in some manner acquire jurisdiction as to him, which plaintiff does not admit to have been necessary.

"That the foregoing stipulation in this the 3d paragraph hereof,

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regarding the recitals in the pleadings and other proceedings, is subject to verification by the production of the defendant of duly certified copies of the record in said cause, unless the same is hereafter waived on the margin hereof by counsel for plaintiff.

"That the sale of said real estate by Edson Allen, master in chancery, as aforesaid, to Henry Anderson, was on the 24th
53 day of September, A. D. 1844; that after said sale the said Henry Anderson and Charles Butler entered into a written contract, a copy of which is hereto attached, marked 'Exhibit E' and made part hereof."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and very part thereof, on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees respectively in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because Charles Butler was not a party to said foreclosure proceedings, and it appearing that Henry Anderson held the Bissell mortgage in trust for Charles Butler, Butler and those claiming under him, including the defendant, are not bound by said proceedings.

3. No determination or discharge of said trust being shown, said foreclosure proceedings are not competent evidence against the defendant.

4. The burden of proof of showing such determination or discharge of said trust being on the plaintiff, who claims under Henry Anderson, his claim to the premises in controversy herein is subject to said trust.

5. Further, because it appears that Henry Anderson was trustee for Charles Butler and became a purchaser at his own sale.

6. The defendant further objected to the deed of the master commissioner to Henry Anderson dated November 18, 1844, identified in said section 3 of said stipulation No. 1, for the reasons and upon each and all of the grounds next hereinbefore specified, and for the further reason that it does not appear that any consideration was paid by said Henry Anderson for said deed.

7. Defendant further severally and separately objected to each and every part of said section 3 and to said master commissioner's deed, because said evidence and said deed, respectively, are incompetent, irrelevant and immaterial.

Thereupon the court sustained said objection so far as same related to said written contract between Henry Anderson and Charles Butler, a copy of which is attached to, marked "Exhibit E," and made part of said stipulation No. 1, but the court overruled said objection so far as same related to the other part of said evidence, so offered, to which ruling the defendant then and there duly ex-

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cepted; and thereupon, over the objection of defendant and
54 subject to exception by him as aforesaid, said section 3 of said stipulation No. 1 hereinbefore set forth was received and read in evidence, except as to that part thereof relating to said written contract, marked "Exhibit E."

Thereupon the plaintiff, further to maintain the issues upon his part, offered in evidence section 4 of stipulation No. 1 herein, same being as follows:

"That Henry Anderson at the time of his death, was a resident of Holly Springs, Marshall county, of the state of Mississippi; that said Henry Anderson made and executed his last will and testament, dated the 28th day of February, A. D. 1846, and afterwards on the 3d day of April of said year, died, after which his said last will and testament was duly probated in and by the Probate Court of Marshall county, Mississippi, which said court by the laws of the state of Mississippi had jurisdiction to probate said will, which afterwards was recorded in said Probate Court as the last will and testament of the said Henry Anderson, deceased, and that afterwards a duly authenticated copy of said last will and testament with the proceedings admitting it to probate and record taken from the records of said Probate Court of Marshall county, Mississippi, was filed in the Probate Court of Lucas county, Ohio, and by it was duly admitted to probate and record, as a will from another state, and then and thereby became and now is the last will and testament of the said Henry Anderson, deceased, and is in full force and effect; a true, full and correct copy of said will being as follows:

"I, Henry Anderson, do make and ordain this to be any last will and testament. I declare my domicil to be the town of Holly Springs, Marshall county, state of Mississippi. I revoke the will made by me on the 3d of March, 1837, and all other wills, if any there be.

"Item. I give, devise and bequeath to Peter Anderson, Walter Goodman and Peter W. Lucas all my property both real and personal, legal and equitable in possession, reversion or remainder, and all claims and demands whatsoever, except such right, title or claim to land, money or choses in action as I may be entitled to as one of the agents of the American Land Company and as one of the stockholders of said company; this property they shall hold in trust and if one or more of them die the survivors or survivor shall hold in trust for the following purposes: they shall pay my debts, other than such as may be owing to the American Land Company, out of moneys on hand and such property as may be sold least injurious to my estate. I wish them to collect debts due to me, and apply to this purpose. They may, if they think fit, and can, obtain an
extension of time on any debt, and they may pledge my prop-
55 erty to raise money to pay debts. They may sell for cash or on credit, and if at any time, they have funds on hand not required for debts or legacies they may invest the same. They shall have full power to make titles for property sold and to pay charges for preservation and in all respect have the power of owner but always as trustees: I have entire confidence in each of them and

therefore I give each the power of all, so that each may do separately what all acting together may do, except in making investments; in that I wish all to join. The annual accounts of my said trustees signed by their respective names shall be binding on my heirs and shall be conclusively so unless error or fraud be clearly established. I have directed the payment of debts, other than what I may owe the American Land Company. I exclude the debts to the Company, because that is subject to an account with the Company and I do not wish my trustees to make payments before that account is adjusted. The adjustment of that account, and the direction and management of the affairs of the company so far as I have power, right or interest, I place in the hands of Peter Anderson and Walter Goodman and when they have finally closed it it shall become a part of the trust created by this article of my will and subject to the control of my said trustees. By saying 'it shall become a part of the trust' I mean the effects and proceeds that I may be entitled to as stockholder and agent of the company.

"Item. As agent of the American Land Company jointly with my brother I am entitled to an account with the trustees, and it is my will that this claim for an account, and all rights, claims and powers growing out of any contract or contracts with the trustees do vest in Peter Anderson and Walter Goodman as I have before said. They shall have power to settle with the trustees immediately or at such time as they may think best, and they shall be entitled to receive conveyances of land, should a division of land take place, and should the notes of the company be divided, they shall be entitled to receive the same. The lands they may receive shall be taken by them as trustees of this my will. They shall have power to execute all papers necessary for a settlement of the agency and all papers executed by them shall be binding on my heirs. When this business is finally closed I direct that they make out and sign a schedule of the property received on account of said interest and an account explanatory of the settlement and the same shall be taken as a proper inventory and the property therein contained shall thereafter become vested in my trustees created by the first clause of my will,

but if there be real estate therein contained, and the same
56 stand in their name, as trustees, that is in the name of Peter Anderson and Walter Goodman as above stated, a title from them shall be good and sufficient to a purchaser. My intention being that this interest shall only come under the administration of the trustees first created and my executors hereinafter named from and after the time such interest is ascertained by a final close with the company. I have acted as agent for the trustees of the American Land Company in respect to the lands of the company in the state of Arkansas and elsewhere. What may be due for such services is a claim that I desire to go to the said Peter & Walter and not to my trustees first named. It forms a portion of my claims against the company which I wish settled on the final settlement with them. I suppose that I have made myself fully understood, but for greater certainty I repeat that my wish is that nothing be taken from the company—interest for debts or legacies unless for such debts as are

connected with the company. At the same time if my other property can not pay my debts or can not pay them without injury, and it be found that it would not be unjust to withdraw funds from the company interest, then it may be done, not otherwise. When my interest in the company is finally ascertained it shall, as I have said, become a part of the trust first created, and the said Peter W. Lucas shall indorse his acceptance of the schedule of the two trustees who have signed it. I give to each, that is to Peter Anderson and Walter Goodman severally the same powers that both are invested with. In both of the trusts created by this will my trustees shall not be required to give security, nor shall they be liable for each other and their accounts signed by them respectively shall be evidence binding on my heirs of the correctness unless error or fraud be clearly shown.

"Item. It is my will that when my son William arrives at the age of twenty-one years the trustees of the first and general trust shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one-half of my property reserving thereout two-fifths parts of said moiety, by valuation which my said trustees shall hold in trust and properly invest and pay over to him at the age of twenty-five years. If my interest in the American Land Company be not brought into the general trust at the time William becomes twenty-one, but is brought in any time before he arrives at twenty-five, so soon as brought in, two-fifths shall be deducted therefrom, and invested and paid over to him at twenty-five, the other three-fifths he shall have as soon as paid in. I find the above does not express my will in this: when I say two-fifths shall be deducted from the
57 interest I may have in the Land Company for investment and three-fifths to be paid to him, I mean two-fifths of a moiety shall be deducted and three-fifths of a moiety paid over.

"It is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective periods of twenty-one and twenty-five years of age being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the regulations laid down concerning the same.

"If either of my sons die without lineal descendants the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants then one-half both of the descendants' original portion as well as one-half of the portion taken by survivorship shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother Peter, be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving then the share shall go to my other brothers and sisters surviving at the time of such decease of my son. I make the following explanation: The limitation over on the death of my surviving son without lineal descendants is intended to take effect

if there be no lineal descendants living at the time of the decease of such son. Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years respectively. The above limitations over shall give way to the provision of such wills.

"Item. I entered into a contract with the American Land Company to warrantee title to such lands of the company as might be sold, and it so is that many title bonds are now out binding me to such warrantees. I give to Peter Anderson and Walter Goodman or either of them the power to execute deeds to carry out such warrantees, and I declare that the name of either with the seal of either to such deeds shall bind my heirs, executors and administrators. It is also the case that I hold lands in common with Daniel Saffarrans. It is important that these lands be sold as purchasers may offer. My undivided half interest has already by this my will been devised to my general trustees. I declare that they or either of them shall have the power to convey with warrantee. This power I pre-
58 sume they have by the first clause of my will, which vests the title in them. I only mention it here for greater certainty.

"Item. If my brother Peter desires to keep up a household in this place. I bequeath to him the use of my house, outhouses, stables, lots, household furniture, books, horses, carriages and whatever belongs to the household establishment and also all my slaves or such of them as he may desire to have. I do not require that any inventory or appraisement of them be made, but on the breaking up of such household, he shall make out an inventory of such as remain unconsumed by use, and my other two trustees shall indorse an acceptance thereof after which time the property in such inventory shall go into the general trust and be subject to all the regulations therein laid down.

"Item. I give to my niece Caroline, daughter of my brother William, one thousand dollars, payable after my debts are satisfied. I direct my executors to pay her sixty dollars per annum as interest thereon from the time of my death until paid.

"Item. I give to my niece Rucelea, daughter of my brother Robert, two thousand dollars payable after my debts are satisfied and I direct my executors to pay her one hundred dollars as interest thereon from my death until paid.

"I have directed that a portion of my property shall be placed in the hands of my sons on their arriving at twenty-one, and I have directed that my trustees shall have the power to procure extension of my debts, and I have made the payment to my sons dependent on the payment of my debts. Now on reconsideration it occurs to me that it may so happen that there will be outstanding and unadjusted accounts at the time my sons arrive at twenty-one, and yet it might be in no wise injurious or improper to place my sons in possession of a part of what may be coming to them. My trustees are therefore authorized, if they think fit, to let them have a portion of what is coming to them at twenty-one, even though some debts may remain unpaid. The amount of such portion shall be according to the discretion of my trustees. It shall not exceed the amount that is lim-

ited to them on the payment of debts, nor ought it to be an amount that would jeopardize their payment.

"Remark. If the payment of the interest on the legacies jeopardize the payment of debts, the payment of such interest must cease without prejudice however to the right of the legatees to have the interest at the time they may be entitled to the principal. I further say that if the bequests to my brother Peter of the use of my household and slaves be found inconveniently to impair the capacity of the
59 executors or trustees to pay debts, the use shall cease and no rights shall arise to him by such lapse or ceasing of the bequest.

"I give to my son William my diamond ring. I give to my son James the watch which my son William wears, which belonged to his mother.

"I appoint my brother Peter to be guardian of my sons and I direct that no security be required of him.

"I appoint my brother Peter and Walter Goodman and Peter W. Lucas to be the executors of this my will and direct that no security be required of either of them.

"In testimony that this is my will I have hereto affixed my seal and have subscribed my name and written my name in the margin this 28th of February, 1846.

(SEAL.) HENRY ANDERSON.

"We the undersigned attest that Henry Anderson signed and sealed this instrument in our presence and declared it to be his last will and we have subscribed the same in his presence and in the presence of each other.

Z. M. PHELPS.
H. M. LUSHER.
ISAAC SAFFARRANS."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because the premises in controversy herein are not shown to have been property which could be devised by Henry Anderson, because said premises were not the property of Henry Anderson at the time of his death.

3. Because by said will, no estate was devised to plaintiff.

4. Because it is not shown that said will was probated in Ohio, in accordance with the provisions of the statutes applicable to such cases.

5. Because it is not shown that Charles Butler or Calvin Bronson,

or either of them, or any one claiming under them, or either of them, including the defendant, acquired title to the premises
60 in controversy with knowledge or notice of said will or of any of the provisions thereof.

6. Also because said evidence and each and every part thereof, is incompetent, irrelevant and immaterial.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said section four of said stipulation No. 1 hereinbefore set forth was received and read in evidence.

Thereupon the plaintiff further to maintain the issues upon his part offered in evidence section five of stipulation No. 1 herein, same being as follows:

"That the said Henry Anderson upon his death left surviving him, his two sons, his only heirs at law, to-wit, William Anderson, who was born February 12, 1828, and James H. Anderson, who was born June 25, 1831; that said William Anderson died intestate January, A. D., 1850, unmarried and without issue."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because said evidence, and each and every part thereof, is incompetent, irrelevant and immaterial.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said section five of said stipulation No. 1 hereinbefore set forth was received and read in evidence.

Thereupon the plaintiff further to maintain the issues upon his part offered in evidence section six of stipulation No. 1 herein, same being as follows:

"That said James H. Anderson, surviving son of Henry Anderson, died intestate at the city of Memphis in the state of Tennessee, on September 16, A. D., 1902, leaving surviving as his only child and only heir at law, the plaintiff, Peter Anderson, who was
61 born August 27, 1859, and who is the grandson and only grandchild and only living descendant of the said Henry Anderson, deceased."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

1. Because all matters in controversy in this action have been

finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because said Peter Anderson, plaintiff herein, has not been shown to have any interest in the premises in controversy in this action.

3. Because said evidence, and each and every part thereof, is incompetent, irrelevant and immaterial.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said section 6 of said stipulation No. 1 hereinbefore set forth was received and read in evidence.

Thereupon the plaintiff further to maintain the issues upon his part offered in evidence, section 7 of stipulation No. 1 herein, same being as follows:

"That the property described in plaintiff's petition and involved in this action is now and was at the commencement of this action worth over $100,000.00, and that the defendant Rosewell Messinger is now and ever since the 15th day of September, 1902, has been in the actual possession of said real estate, and during all of said time has received the rents issues, and profits thereof, and at all times since said date has refused and still refuses to surrender said real estate to plaintiff or to account to him for said rents, issues and profits or any part thereof."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintain-
62 ing his alleged cause of action herein, or either of them, against the defendant.

2. Because said evidence, and each and every part thereof, is incompetent, irrelevant and immaterial.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said section 7 of said stipulation No. 1 hereinbefore set forth was received and read in evidence.

Thereupon the plaintiff further to maintain the issues upon his part offered in evidence section 8 of stipulation No. 1 herein, same being as follows:

"That at the commencement of this action the plaintiff Peter Anderson was, now is and all the time since has remained a resi-

dent and citizen of the city of Memphis of the state of Tennessee and of no other city or state, and this defendant, Rosewell Messinger at the commencement of this action was a resident and citizen of Lucas county, Ohio, and at all of said times has remained and now is a resident and citizen of said county and state, all as stated in plaintiff's petition filed herein."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because said evidence, and each and every part thereof, is incompetent, irrelevant and immaterial.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said section 8 of said stipulation No. 1 hereinbefore set forth was received and read in evidence.

Thereupon the plaintiff further to maintain the issues upon his part offered in evidence stipulation No. 5 herein, same being as follows:

"That the gross income to defendant from the property in controversy, from September 16, 1902, the date of the death of
63 James H. Anderson to and until December 27, 1904, the date of the filing of the petition herein, a total period of two years three and one-half months, was thirty thousand ($30,000.00) dollars.

"That during said period of two years three and one-half months, defendant paid for and on account of said property the following sums:

Taxes and assessments	$8,250.00
Insurance and repairs	3,500.00
For water rent, electric light, coal for heating said building and janitor service	5,250.00
Total	$17,000.00

"That the gross income to defendant from the property in controversy from December 27, 1904, at which date the petition was filed herein, to June 20, 1905, was six thousand five hundred ($6,500.00) dollars.

"That during said period of about six months, defendant paid for and on account of said property the following sums:

Taxes and assessments	$1,650.00
Insurance and repairs	750.00
For water rent, electric light, coal for heating said building and janitor services	1,100.00
Total	$3,500.00

"The statements contained in the foregoing stipulation or any of them, may be offered and read in evidence by either of the parties to this cause, upon the trial thereof, with the same force and effect that the proof of said facts in the usual way would have, subject however to such objection as said parties respectively may see fit to interpose thereto for want of competency, relevancy or materiality."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because not proper proof of the mesne profits and
64 damages, if any, recoverable in this action.

3. Because said evidence, and each and every part thereof, is incompetent, irrelevant and immaterial.

4. The defendant further objects to such facts set forth in said stipulation as fix the rent from the premises in controversy from and after December 27, 1904 (at which date this action was commenced) to June 20, 1905, and the several sums paid therefrom for taxes and sundry items, because said facts cannot now be considered in this action, but are to be determined and adjusted, if at all, in proceedings for the benefit of occupying claimants in accordance with the statues of Ohio in such cases made and provided.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon over the objection of defendant and subject to exception by him as afore-said, said stipulation No. 5 hereinbefore set forth was received and read in evidence.

Thereupon the plaintiff further to maintain the issues upon his part offered in evidence section 8 of stipulation No. 3 herein, same being as follows:

"That the parents of Henry Anderson died some years prior to the date of his death."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

1. Because all matters in controversy in this action have been

finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because said evidence, and each and every part thereof, is incompetent, irrelevant and immaterial.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said section 8 of stipulation No. 3 *herein* hereinbefore set forth was received and read in evidence.

Plaintiff further to maintain the issues upon his part, offered in evidence a statement furnished by the defendant, Rosewell E. Messinger, that the net rents received from the property the title to which is in controversy herein, in its improved state, between June 20, 1905, and December 5, 1907, amounted to $21,500, and that the expenses and receipts during said period were uniform; it being stipu-
65 lated by and between counsel for the parties to this action that said statement shall, if received in evidence, be given the same force and effect as if proof of the same facts were offered, made and received in the usual manner.

Thereupon defendant, although not objecting to the form of such proof, objected to such evidence on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against defendant.

2. Because not proper proof of the mesne profits and damages, if any, recoverable in this action.

3. Because said evidence, and each and every part thereof, is incompetent, irrelevant and immaterial.

4. The defendant further objects to such facts set forth in said statement as fix the rents from the premises in controversy from and after June 20, 1905, because said rentals cannot now be considered in this action, but are to be determined and adjusted, if at all, in proceedings for the benefit of occupying claimants, in accordance with the statutes of Ohio in such cases made and provided.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said statement furnished by said Rosewell E. Messenger hereinbefore set forth was received and read in evidence.

Thereupon the plaintiff rested.

Thereupon, the defendant, to maintain the issues upon his part, offered in evidence duly certified transcript of the proceedings and final record in the court of common pleas of Lucas County, Ohio, in cause No. 53,924 therein, entitled Peter Anderson, plaintiff, vs. The United Realty Company, Rosewell E. Messinger et al., defendants, said certified transcript being hereto attached, marked "Exhibit B," and hereby made part of this bill of exceptions; and same being received in evidence, defendant, by his counsel, read in evidence therefrom as follows:

53924.

PETER ANDERSON
vs.
66 THE UNITED REALTY COMPANY et al.

Pleas before the Court of Common Pleas within and for the county of Lucas and state of Ohio, at a term thereof begun and held at the court house in the city of Toledo, on Tuesday, the 2nd day of January, in the year of our Lord one thousand nine hundred and six.

Present—

Honorable Jason A. Barber.
Honorable Julian H. Tyler.
Honorable Lindley W. Morris.
Honorable Reynolds R. Kinkade.

Be it remembered, that heretofore, to-wit, on the 25th day of July, 1905, plaintiff by his attorney filed in said court a petition in the above entitled cause, which petition was filed on July 29, 1905.

Endorsed on said petition and filed therewith was a praecipe for summons in the above entitled cause, which praecipe is in the words and figures as follows, to-wit:

To the Clerk: Issue summons for the above named defendants addressed to the sheriff of Lucas county, Ohio, returnable according to law. Endorse on the same "Action for money, and damages in excess of $50,000.00, for an accounting, and for the possession and delivery of real estate."

RHEA P. CARY AND
CHAS. A. THATCHER,
Plaintiff's Attorneys.

Thereupon, a summons in said cause was issued by the clerk of said court.

Appearing at page 1 of said record.

On the 29th day of July, 1905, there was refiled in said court a petition as amended in the above entitled cause, which petition is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

67 PETER ANDERSON, Plaintiff,

vs.

THE UNITED REALTY COMPANY, THE DOW-SNELL COMPANY, The Huebner-Toledo Breweries Company, John P. Freeman, Charles R. Messinger, Rosewell E. Messinger, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson, Mary E. Nearing, George W. Ruhl, Florence Scott Libbey, Mary A. Scott, Susan M. Johnson, The Connecticut Mutual Life Insurance Company, The George H. Hammond Company, The Joseph Schlitz Brewing Company, Defendants.

Petition.

Plaintiff says that he is a citizen and resident of the state of Tennessee. That The United Realty Company, The Dow Snell Company, and The Huebner-Toledo Breweries Company, are corporations organized and existing under the laws of the state of Ohio, having offices and places of doing business in the city of Toledo, Lucas county, Ohio. That John B. Freeman, Charles R. Messinger, Rosewell E. Messinger, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson, Mary E. Nearing, George W. Ruhl, Florence Scott Libbey and Mary A. Scott, are citizens and residents of the county of Lucas, state of Ohio. That Susan M. Johnson is a citizen and resident of the city of Boston, Massachusetts. That The Connecticut Mutual Life Insurance Company is a corporation organized under the laws of the state of Connecticut, having an office and place of doing business in the city of Toledo, Lucas county, Ohio. That the George H. Hammond Company and The Joseph Schlitz Brewing Company are corporations organized under the laws of a state to plaintiff unknown but well known to the defendants (but not the state of Tennessee).

First. For a first cause of action against the defendants, plaintiff says that he has a legal estate in, is the owner in fee simple of and is entitled to the immediate possession of the following described real estate, to-wit: Lots numbered three hundred and thirty-two (332), two hundred and ninety-eight (298) and one hundred and seventy-six (176), in the Port Lawrence division of the city of Toledo, Lucas county, Ohio.

Also, lots numbered nineteen (19), except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof; twenty-
68 one (21); thirty-three (33); thirty-four (34); eighteen (18) and the southeast nineteen (19) feet of the southwest eighty (80) feet of lot numbered nineteen; ten hundred (1,000); ten hundred and one (1,001), and nine hundred and ninety-two (992), all in the Vistula division of the city of Toledo, Lucas county, Ohio. That said lots exceed one hundred thousand ($100,000.00) dollars in value. That the said defendants unlawfully keep the plaintiff out of the possession of said premises.

Second. For a second cause of action against the said defendants, plaintiff adopts and makes a part hereof each and every allegation hereinbefore set forth, and says:

That since the sixteenth day of September, 1902, the plaintiff has had a legal estate in, has been the owner in fee simple of and is entitled to the use and possession of the real estate described in plaintiff's first cause of action.

That the defendants have been wrongfully keeping plaintiff out of the possession of said real estate, and have received the rents, issues and profits therefrom since the said sixteenth day of September, 1902.

That by reason thereof the plaintiff has lost said rents, issues and profits and has sustained damages by reason of the unlawful withholding of the possession of said property from the plaintiff during said time, all of which is of the value and damage to the plaintiff in a sum in excess of fifty thousand (50,000.00) dollars, the exact amount to plaintiff unknown, but well known to the said defendants.

Wherefore, plaintiff prays for judgment against the said defendants for the recovery of the possession of the said premises hereinbefore described, and also for the said sum of fifty thousand (850,000.00) dollars, with interest thereon; and also for any rents and profits, or damages which may accrue subsequently to the filing of this action, up to and including the time that judgment may be entered in favor of plaintiff herein. Plaintiff further prays for costs and all other legal and equitable relief, to which he may be entitled.

PETER ANDERSON,
By RHEA P. CARY AND
CHAS. A. THATCHER,
His Attorneys.

STATE OF OHIO,
Lucas County, ss:

Peter Anderson, being by me first duly sworn, makes oath and says that the matters and things set forth in the foregoing petition are true, as he verily believes.

PETER ANDERSON.

69 Subscribed by the said Peter Anderson in my presence and by him sworn to before me this the 26th day of June, A. D. 1905.

ARCHIE W. FRENCH
[SEAL.] *Notary Public, Lucas County, Ohio.*

Endorsed on said petition, but filed on July 29, 1905, was a praecipe for summons in the above entitled cause.

Thereupon, a summons in said cause was issued by the clerk of said court.

Appearing at pages 3-5 of said record.

On the 21st day of February, 1906, there was filed in said court a separate amended answer of the defendant, Rosewell E. Messinger,

in the above entitled cause, which separate amended answer is in the words and figures as follows, to-wit:

In the Court of Common Pleas, Lucas County, State of Ohio.

No. 53924.

PETER ANDERSON, Plaintiff,
vs.
THE UNITED REALTY COMPANY et al., Defendants.

Separate Amended Answer of the Defendant, Rosewell E. Messinger.

The defendant, Rosewell E. Messinger, for his separate amended answer to plaintiff's petition, and for his first defense thereto, says:

First Defense.

That heretofore, to-wit: on the 27th day of December, A. D., 1904, the plaintiff, Peter Anderson, filed his petition and commenced his action in the Circuit Court of the United States for the Western Division of the Northern District of Ohio, against this defendant, Rosewell E. Messinger, to recover the following described real estate, viz:

Lots numbers twenty (20), twenty-one (21), except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof, lots numbers thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), one thousand and eight (1,008), one thousand and nine (1,009), all in and of the Vistula division of the city of Toledo, county of Lucas and state of Ohio, being part of the real estate involved in this action.

That the said petition alleged that the plaintiff, Peter Anderson, has a legal estate in, the legal title to, was the owner in fee simple and entitled to immediate possession of said above described real estate, and that this defendant, Rosewell E. Messinger, defendant in this action, has unlawfully kept plaintiff out of the possession of said premises ever since the 16th day of September, 1902, and that the said Rosewell E. Messinger had during said time received
70 the rents, issues and profits of said premises of a value in excess of $10,000. Said petition prayed that the plaintiff, Peter Anderson, might have judgment against this defendant, Rosewell E. Messinger, for the possession of said real estate involved in said action, and for $10,000 the value of the rents and profits thereof received and retained by this defendant, Rosewell E. Messinger, since.

That this defendant, Rosewell E. Messinger, was duly served with summons, entered his appearance and filed his answer in said action, denying the title and right of possession of said Peter Anderson to said real estate, and each and every part thereof.

That the petition further alleged that the said Peter Anderson was a resident and citizen of the city of Memphis, of the state of

Tennessee, and that this defendant was a resident and citizen of the city of Toledo, of the state of Ohio, and that said real estate was of the value of $100,000; and this defendant says that the said Circuit Court of the United States for the Western Division of the Northern District of Ohio, had full and complete jurisdiction over the persons of the parties to said suit, and had the right to determine the issues involved in said action:

That afterwards, in the month of June, A. D., 1905, at the June term of said court, the said action came duly on for trial before the court, and was heard upon the issues joined in the pleadings, the evidence offered by the parties and was argued by counsel, and the court being fully advised in the premises, duly found that the plaintiff, Peter Anderson, did not have the legal title to, and did not own said real estate, or any part thereof, and entered its order and judgment in said action dismissing said petition and ordering this defendant, Rosewell E. Messinger, to go hence without day, and recover his costs expended in said action, and that the petition in said action be dismissed, which judgment of the said court remains unreversed and in full force to this day:

That at the time of the commencement of said action, this defendant, Rosewell E. Messinger, had the title to and was in possession of all of the real estate involved in said action;

That the issues involved in said action were substantially the same as are involved in this action, and this defendant says the same have been determined and adjudicated by the said United States Circuit Court in behalf of this defendant, Rosewell E. Messinger, and that said cause of action involved in plaintiff's petition, so far as this defendant is concerned, has heretofore been adjudicated in favor of this defendant.

71 This defendant further says that the titles of both the plaintiff, Peter Anderson, and of this defendant, Rosewell E. Messinger, to the real estate involved in this action claimed by this defendant, and all the facts relating thereto are the same as their respective titles and the facts relating to the real estate involved in said action, each said party deriving his said title in said action by the same conveyance and facts as they, respectively, derived their several titles to the real estate involved in the issues between them in this action, and this case involves the same questions of fact and law as were involved in said action.

Second Defense.

Said defendant, Rosewell E. Messinger, for his second defense to plaintiff's petition, further says:

Said defendant, Rosewell E. Messinger, denies that the plaintiff has a legal estate or title or any other estate or title in lot number nineteen (19), except the southwest eighty (80) feet of the southeast nineteen (19) feet thereof, and all of lot number twenty-one (21) all being in the Vistula division of the city of Toledo, Lucas county, Ohio, described in the plaintiff's petition.

He denies that the plaintiff is the owner in fee simple, or otherwise, of said real estate, or any part thereof.

He denies that the plaintiff is entitled to the possession of said real estate, or any part thereof.

Said defendant, Rosewell E. Messinger, admits that he is now and has been ever since September 16, 1902, receiving the rents, issues and profits, and now and ever since September 16, 1902, has been keeping the plaintiff out of the possession of said real estate; but he denies that he has received or is receiving any of the rents, issues or profits, or that he is in any way keeping the plaintiff out of the possession of any part of the other real estate described in plaintiff's petition.

Said Rosewell E. Messinger further says that he is the owner in fee simple, has the legal title to and is in the actual possession of the real estate above particularly described, and has received the rents and profits of said real estate ever since the 22nd day of December, 1906, but denies he has ever received any rents, issues or profits of any other real estate in plaintiff's petition described.

That the title of this defendant, Rosewell E. Messinger, to said real estate relied on in this defense is other and different from that hereinafter set up in his third defense in this amended answer.

Third Defense.

The said defendant, Rosewell E. Messinger, for his third defense to the petition of plaintiff, further says:

72 That all the right, title or interest owned, claimed or held by the plaintiff, Peter Anderson, in or to the real estate involved in this action and described in plaintiff's petition, is derived and claimed by the plaintiff through the will of his grandfather, Henry Anderson, late of the city of Holly Springs, of Marshall county, of the state of Mississippi.

That on the first day of July, A. D., 1841, one Charles Butler, of New York city, executed to said Henry Anderson his note of said date for twenty thousand dollars ($20,000), payable in one day from its date, with interest thereon at six per cent per annum; that afterwards, on the 23rd day of September, A. D., 1841, the said Charles Butler, in order to secure the payment of said note to said Henry Anderson, assigned, transferred and set over to the said Henry Anderson, a certain note for twenty-one thousand five hundred dollars ($21,500), dated May 19, 1838, executed by Edward Bissell to said Charles Butler, together with a certain mortgage securing said note, executed by said Bissell and wife to said Butler, upon among others, all the lots, lands and real estate described in plaintiff's petition, which said mortgage had previously been duly recorded on pages 267 and 269, inclusive, of volume 2 of the public record of mortgages of Lucas county, Ohio, kept in the recorder's office in and for said county; that the said assignment of said mortgage to said Anderson set forth that the same was in trust for the benefit of the said Butler, and the said Anderson

received from said Butler and at all times thereafter held the said note and mortgage as collateral security for the payment of Butler's said note to the said Anderson and for no other purpose;

That afterwards, on or about the 9th day of September, 1843, the said Henry Anderson, commenced in the Court of Common Pleas of Lucas county, Ohio, his certain action in chancery to foreclose said Bissell's mortgage, wherein the said Anderson was complainant and said Edward Bissell and wife and others were defendant; and such proceedings were had and taken in said action that the said court at its April term thereof for the year 1843 entered a decree finding the amount due on said mortgage and ordering the said mortgaged lands sold for the payment thereof, and an order of sale was thereafter issued on said decree to one Edson Allen, master in chancery of said court, who in pursuance of said decree on the 24th day of September, 1844, sold said premises to said Henry Anderson, at the price of sixty-nine hundred and twenty-one dollars (6,921), who afterwards received a master's deed for said premises, based on said sale, and dated the 18th day of November, A. D., 1844; that said Charles Butler was not a party to said
73 suit and was not bound thereby, and his rights in said mortgage remained the same as between him and said Anderson, and was in no manner affected by said action, decree, proceedings and sale, but the said Anderson received said deed, and thereafter held whatever title was thereby conveyed to him as security for said Butler's said debt to said Anderson, on the same terms and conditions on which he had previously held the said Bissell note and mortgage;

That after said Anderson received said deed, to-wit: on April 3, A. D., 1846, he departed this life, at and being a resident of the city of Holly Springs, of the state of Mississippi, leaving a will, which was afterwards duly probated, allowed and recorded in and by the Probate Court of Marshall county, Mississippi, which court, by the constitution and laws of said state, had jurisdiction to probate said will; that Peter Anderson, the brother of said Henry Anderson, Walter Goodman and Peter W. Lucas, all residents of said Marshall county, Mississippi, were nominated in and by said will as the executors of the will and trustees of the estate of said Henry Anderson, and were afterwards, in the month of April, 1846, duly appointed such executors and trustees, and were fully authorized and empowered to execute the last will and testament of said Henry Anderson, deceased, and administer his estate; and the said Peter Anderson, Walter Goodman and Peter W. Lucas, duly entered upon their duties as such executors and trustees, and became and from thence continued until sometime unknown to this defendant, being after the year 1861, the duly qualified and acting executors of the will and trustees of the estate of said Henry Anderson, deceased;

That while said executors and trustees were acting as aforesaid, the said note, dated July 1, 1841, for $20,000, and interest from said date, executed by said Charles Butler to said Henry Anderson,

came into the hands of the said executors and trustees for collection, who demanded from the said Charles Butler, the said $20,000 full face of said note, with interest thereon from July 1, 1841, without any deduction or credit on account of the said lands purchased by the said Henry Anderson as aforesaid, at Toledo, Ohio, at the said foreclosure sale; and the said Charles Butler from time to time thereafter paid to the said executors and trustees on his said note to the said Henry Anderson the full amount due thereon, being the $20,000 principal and the interest from July 1, 1841, and in all over thirty-nine thousand dollars ($39,000); that said Butler paid to said executors and trustees on his said note the following
74 amounts hereinafter severally stated, as follows:

October 1, 1852, by commission due from The American Land Company to Charles Butler, and received by said executors	$5,967.49	
October 1, 1852, by interest on same allowed by said trustees in settlement	1,551.12	
October 1, 1852, by interest on same	6.24	$7,225.15
October 1, 1849, by cash		3,376.52
October 10, 1849, by cash		2,700.00
October 1, 1851, by cash		1,110.00
October 1, 1852, by cash		2,000.00
October 1, 1852, by cash		1,669.96
May 4, 1855, by cash		3,000.00
October 30, 1855, by cash		4,340.00
October 30, 1855, by cash		1,027.60
January 1, 1857, by cash		4,000.00
May 7, 1860, by cash		2,041.00
August 9, 1860, by cash		500.00
February 1, 1861, by cash		2,419.49
May 8, 1861, by cash, per draft of James Anderson on Charles Butler		2,172.70
		$37,882.42

which amounted to more than the principal and interest due on said note, and said Butler paid to said executors and trustees on said note further and additional amounts, which amounts and times of such payments are unknown to this defendant, and thereby the said Butler paid more than the principal and interest of his said note;

That the said Henry Anderson, in his life time, and the said Peter Anderson, Walter Goodman and Peter W. Lucas, as such executors and trustees, afterwards held said lands to secure the payment of said Butler's note and for the benefit of the said Butler as their cestui que trust, and at all times promised and agreed with said Butler to sell, convey, release and surrender said lands to said Butler on his paying his said note, which said trustees held for collection;

That on or about October 1, 1855, the said Peter Anderson,

Walter Goodman and Peter W. Lucas, executors and trustees, deposited with one Caleb O. Halstead, president of The Manhattan Company Bank of New York city, their deed, dated October 1, 1855, to said Charles Butler, of all the lands included in the said Bissell mortgage, and including all the lands involved in this
75 action, to be delivered to the said Butler on his paying the balance due on the said Butler note aforesaid:

That in April, A. D., 1860, the said Butler having paid or secured to the satisfaction of said executors and trustees the balance due on said Butler note, the said deed by their direction was delivered to the said Butler, who filed the same for record with and the same was recorded by the recorder of Lucas county, Ohio, on May 2, 1860, on page 110 of volume 34 of the public records of deeds of Lucas county, Ohio;

That after the said deed was delivered and recorded as aforesaid, Calvin Bronson, of Toledo, Ohio, the person under whom this defendant, Rosewell E. Messinger, claims title to the lands involved in this action, in good faith and for a valuable consideration, viz: $17,500, paid by him to the said Charles Butler, purchased from the said Charles Butler the property described in the second defense herein of this amended answer, to which reference is hereby made for greater certainty; and the said Charles Butler by a deed dated April, 23, 1860, upon and for said consideration paid by said Calvin Bronson, conveyed said property to him, his heirs and assigns forever; that said Calvin Bronson was the grandfather of this answering defendant, and that this defendant, Rosewell E. Messinger, by regularly executed deeds of conveyance to himself from the other heirs of said Calvin Bronson whereby the property of said Calvin Bronson was partitioned among his said heirs, now owns, holds and is in possession of the lands which are described in the second defense of this action, and owns all of the right, title and interest acquired therein by the said Calvin Bronson from the said Butler as aforesaid;

That the said plaintiff, Peter Anderson, is the only living descendant and the only heir at law of said Henry Anderson, deceased, and whatever title he has or claims to said premises is derived by, through and under the said Henry Anderson's will and is subject to this defendant's rights and equities in the premises;

That the said plaintiff now alleges, claims and gives out that the said deed from the said executors and trustees to said Charles Butler is, for reasons unknown to this defendant, defective, illegal and insufficient to convey the legal title of said lands. This defendant says that if said deed is for any reason insufficient to convey the legal title, then the said plaintiff holds whatever, if any, title he may have in said lands in trust and for the benefit of this defendant, and should convey the same to this defendant, the owner of the equitable, if not the legal title to said lands.

76 Wherefore, this answering defendant asks that said petition be dismissed as to him and that he may go hence without costs.

KING & TRACY,
Attorneys for Defendant.
ROSEWELL E. MESSINGER.

STATE OF OHIO,
Lucas County, ss:

Rosewell E. Messinger, being first duly sworn, deposes and says that he is the defendant who filed the foregoing amendment answer, and that the statements made and allegations contained therein are true, as he verily believes.

ROSEWELL E. MESSINGER.

Sworn to before me and subscribed in my presence this 20th day of February, 1906.

[SEAL.] HARRY W. LLOYD.

Appearing at pages 84-92 of said record.

On March 2, 1906, there was filed in said court an amended reply in the above entitled cause, which amended reply is in the words and figures, as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

PETER ANDERSON, Plaintiff,
vs.
THE UNITED REALTY COMPANY et al., Defendants.

Reply.

Now comes plaintiff and for reply to the several amended answers of the several defendants filed herein, says that he admits that the ownership and title to lot 21, except the southeast 19 feet of the southwest 80 feet thereof, and lot No. 33 in the Vistula division of the city of Toledo, described in plaintiff's petition, is involved in an action pending between the plaintiff and the defendant, Rosewell E. Messinger, in the Circuit Court of Appeals of the United States, Sixth Circuit, and were by clerical error included in plaintiff's petition filed herein. Plaintiff therefore withdraws from this proceeding all questions involved as to the title and ownership of said above named lots, and for the foregoing reason makes no further reply to the several allegations contained in the separate amended answer of Rosewell E. Messinger, filed herein in relation to said lots.

Plaintiff admits that his title to the property described in his petition is derived and claimed by him through the will of his grandfather, Henry Anderson. He admits that Charles Butler executed to Henry Anderson his note for twenty thousand dollars as described in the several amended answers of defendants; and that said Butler assigned, transferred and set over to said Henry Anderson a certain note and mortgage for twenty-one thou-
77 sand, five hundred dollars, executed by Edward Bissell, as collateral security for said note of twenty thousand dollars, so executed and delivered to Henry Anderson by said Butler. He

admits that an action was commenced by said Henry Anderson to foreclose said mortgage so given by said Bissell and that a decree was rendered in said action, and that a sale of the premises described in plaintiff's petition was made by Edson Allen, master commissioner in chancery, to Henry Anderson on the 24th day of September, 1844, for the sum of six thousand nine hundred and twenty-one dollars, and a deed was duly executed and delivered by said master to the said Henry Anderson for all of said premises, on November 18, 1844.

Plaintiff further says that said action of foreclosure was brought by the said Henry Anderson with the knowledge and at the request of Charles Butler, and that the said Charles Butler was made a party to said action and duly entered his appearance therein. That a decree of foreclosure was entered in said action and said property was ordered by the court to be sold by the said master commissioner. That a public sale of said property was made by said master commissioner and that the said Henry Anderson made the highest bid of any person who bid upon said property, and purchased the same. That said sale was confirmed and a deed of said property was delivered to said Henry Anderson. That said Charles Butler had full knowledge that said property had so been purchased by said Anderson and acquiesced in the purchase of the same by said Anderson, and consented to the purchase of said property by said Anderson. That thereafter said Butler made no objection to the purchase of said property by said Anderson, but with full knowledge that the same had been purchased by said Anderson for his own use and benefit, remained silent on the subject of said purchase for many years after the death of the said Anderson, which occurred in the year 1846.

Plaintiff says that he is unable to state the exact time during which the said Butler made no claim to said property, but said fact is well known to the defendant.

Plaintiff says that by reason of the premises the defendants are estopped from claiming that the said Anderson purchased said property in trust for said Charles Butler.

Plaintiff avers that the said Henry Anderson thereby acquired absolute title to all of the property described in plaintiff's petition, and that at no time after the action, decree, proceedings and
78 sale in said case, was his said title burdened or charged with any trust in favor of the said Butler.

Plaintiff admits that said Henry Anderson departed this life April 3, 1846, and left a will which was duly probated, as alleged in defendants' amended answers, and that the various persons named in defendants' amended answer, were nominated as executors in said will, and that said persons qualified under said will.

Plaintiff admits that Calvin Bronson was the grandfather of Rosewell E. Messinger and that plaintiff is the only living descendant and heir of Henry Anderson, and claims and gives out that an alleged deed said to have been executed by the executors and trustees of Henry Anderson to Charles Butler, is illegal and insufficient to convey the title of the premises described in plaintiff's petition.

Plaintiff denies each and every allegation contained in the several answers of the several defendants, filed herein, except such allegations as are pleaded in his petition and admitted in this reply.

RHEA P. CARY AND
C. A. THATCHER,
Attorneys for Plaintiff.

STATE OF OHIO,
Lucas County, ss:

Rhea P. Cary, being duly sworn, says that he is one of the attorneys for the plaintiff, who is a non-resident of the state of Ohio, and now absent therefrom, that the allegations contained in the foregoing reply are true, as he verily believes.

RHEA P. CARY.

Subscribed and sworn to before me this 2nd day of March, 1906.

[SEAL.] ALONZO G. DUER,
Notary Public, Lucas County, Ohio.

Appearing at pages 94-97 of said record.

On the 23rd day of February, 1906, being the forty-sixth day of January term, 1906, an order in said cause was made, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

53924.

PETER ANDERSON
vs.
THE UNITED REALTY COMPANY et al.

This cause came on to be heard and a jury was empaneled and sworn. Thereupon, it is ordered stenographer report the evidence herein.

Appearing at page 92 of said record.

On the second day of March, 1906, being the fifty-second day of the January term, 1906, a verdict in said cause was rendered, an entry of which appears on the journal of said court, in the words and figures as follows, to-wit:

79 53924.

PETER ANDERSON
vs.
THE UNITED REALTY COMPANY et al.

This day came the parties with their attorneys, a jury being called, one came, to-wit: Theo. Meissner, J. M. McCann, Chas. Munday, Martin Neuhausel, A. A. Moody, J. C. Blair, D. J. Nysewander, B.

M. Campbell, E. F. Gleason, Fred W. Ruppel, Ernest Blackmore, N. S. Lyons, who being duly empaneled and sworn, and being fully advised in the premises, report the following verdict:

Court of Common Pleas, Lucas County, Ohio.

PETER ANDERSON
vs.
THE UNITED REALTY COMPANY et al.

We, the jury empaneled in the above entitled action, for verdict find and say that we find for the defendants, and for each of them.

FRED W. RUPPEL, *Foreman.*

Appearing at page 97 of said record.

On the 31st day of March, 1906, being the seventy-seventh day of the January term, 1906, a judgment in said cause was rendered, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

53924.

PETER ANDERSON
vs.
THE UNITED REALTY COMPANY et al.

On this, the thirty-first day of March, 1906, this case came on for hearing on the motion of the plaintiff to set aside the verdict of the jury and grant a new trial. On consideration of said motion, the court finds that said motion is not well taken and hereby overrules the same. It is therefore ordered and adjudged that the petition of the plaintiff be, and the same is hereby dismissed, and that the defendants have and recover from the plaintiff their costs herein incurred, taxed at $—. To which action of the court the plaintiff then and there duly excepted, and is allowed by the court the statutory time in which to prepare, file and have allowed his bill of exceptions in this case.

JULIAN H. TYLER, *Judge.*

Appearing at page 98 of said record.

Thereupon the defendant, further to maintain the issues upon his part, offered and read in evidence bill of exceptions and exhibits thereto allowed and signed by the Common Pleas Court of Lucas county, Ohio, appearing in printed copy of record in the Supreme Court of the state of Ohio, in proceedings in error No. 10,689
80 therein, entitled Peter Anderson, plaintiff in error, vs. The United Realty Company, Roswell E. Messinger et al., defendants in error, being proceedings pending in said court to reverse the judgment of the Court of Common Pleas and Circuit Court in

said cause No. 53,924, entitled Peter Anderson, plaintiff, vs. The United Realty Company, Rosewell E. Messinger et al., defendants; said printed copy of said record being hereto attached, marked "Exhibit C," and hereby made part of this bill of exceptions.

Thereupon, it was duly stipulated in open court by and between counsel for the respective parties to the above entitled action, that without waiving any objection for want of competency, relevancy or materiality, said copy of said record of said proceedings in the Supreme Court, or any part thereof, might be offered and read in evidence on the trial herein with the same force and effect as though duly certified for use as evidence in accordance with the Act of Congress in such cases made and provided, said bill of exceptions read and received in evidence in behalf of defendant being as follows:

Common Pleas Court of Lucas County, Ohio.

PETER ANDERSON, Plaintiff,

vs.

THE UNITED REALTY COMPANY, THE DOW-SNELL COMPANY, JOHN P. FREEMAN, CHARLES R. MESSINGER, ROSEWELL E. MESSINGER, AARON CHESBROUGH, CLARENCE M. LAMB, EDWARD H. THOMPSON, MARY E. NEARING and THE JOSEPH SCHLITZ BREWING COMPANY, Defendants.

Before Tyler, J., and a jury, February 23, 1906.
Plaintiff's bill of exceptions. (Filed April 25, 1906.)

Appearances.

For plaintiff: Rhea P. Cary, Esq.; C. A. Thatcher, Esq.
For defendants: C. W. Everett, Esq.; O. B. Snider, Esq.; King & Tracy, E. E. Davis, Esq.; Swayne, Hayes, Fuller & Tyler, Rhoades & Rhoades, Geo. A. Bassett, Esq.

Plaintiff's Bill of Exceptions.

Be it remembered, that on the trial of this cause in the Court of Common Pleas of Lucas county, Ohio, before the Hon. Julian H. Tyler, one of the judges of said court, and a jury duly impaneled and sworn, at the January term thereof, A. D., 1906, the following proceedings were had:

Testimony on Behalf of Plaintiff.

81 Plaintiff, to maintain the issues on his part, offered and read in evidence Sections 1, 2, 3, 4, 5, 6, 7 and 25 of the stipulation Exhibit No. 1 which is hereto attached and made a part hereof, so marked.

Plaintiff likewise offered and read in evidence Exhibits A and B to said stipulation Exhibit No. 1 hereto attached and made a part hereof; Exhibit A being the copy of a contract between Henry An-

derson and Charles Butler, dated October 4, 1844; and Exhibit B being a copy of will of Henry Anderson.

Plaintiff likewise offered and read in evidence copy of deed from Allen, master commissioner, to Henry Anderson, dated November 18, 1844, which is hereto attached and made a part thereof, marked Exhibit No. 2.

Thereupon, plaintiff rested.

Testimony on Behalf of Defendants.

Defendants, to maintain the issues on their part, offered and read in evidence, each of Sections 8 and 9, and the second paragraph of No. 11 and all of 12 to 25, inclusive, of said stipulation Exhibit No. 1, hereto attached and made a part hereof, and likewise the concluding unnumbered paragraph of said stipulation. To each of the paragraphs of said stipulations so offered and received by the court, plaintiff at the time separately objected, and each of said objections was at the time overruled by the court, to each of which rulings and orders of the court plaintiff at the time separately excepted.

Defendants likewise offered and read in evidence each of Exhibits C, D, G, H, I and J to said Exhibit No. 1 and the stipulations therein contained, to the action of the court in admitting which exhibits plaintiff at the time separately objected, and said objections were in each instance at the time overruled, to each and every of which plaintiff at the time separately excepted.

Defendants likewise offered and read in evidence a certified copy of a deed from Sidney Bissell and Edward Bissell and Jane A. M. Bissell to Charles Butler, dated February 22, 1843, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 3. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence a certified copy of a deed from Peter Anderson and Walter Goodman, trustees and executors of Henry Anderson, deceased, to Charles Butler, dated October 1, 1855, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 4. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence a certified copy of a deed from Peter W. Lucas, executor and trustee, to Charles Butler, dated April 16, 1860, a copy of which is hereto at-
82 tached and made a part hereof, marked Exhibit No. 5 (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence a certified copy of a deed from James H. Anderson and wife to Charles Butler, dated April 7, 1860, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 6. (Objected to; overruled; plaintiff excepted.)

Defendants also offered and read in evidence a certified copy of a deed from Charles Butler and wife to Calvin Bronson, dated April 23, 1860, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 7. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered in evidence certified copies of certain

tax deeds, which were marked Exhibits Nos. 8 to 14, both inclusive. (Objected to; sustained; defendants each excepted.)

(It is agreed by the parties in this case that Mr. O. B. Snider, mentioned in the stipulation, has received, kept, and produced in court the several exhibits mentioned in Exhibit J attached to Exhibit No. 1.)

Defendants likewise offered and read in evidence a statement which is marked Exhibit No. 19, which is hereto attached and made a part hereof. (Objected to; overruled; plaintiff excepted.)

Defendant likewise offered and read in evidence a certain receipt, dated New York, September 27, 1852, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 20. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence receipt from Peter Anderson, executor, to Charles Butler, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 21. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence receipt of W. Goodman, July 1, 1841, to Charles Butler, a copy of which is hereto attached, and made a part hereof marked Exhibit No. 22. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence receipt of W. Goodman, Ex'r, to Charles Butler, May 12, 1855, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 23. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence a paper a copy of which is hereto attached and made a part hereof, marked Exhibit No. 24. (Objected to; overruled; plaintiff excepted.)

83 Defendants likewise offered and read in evidence a receipt from W. Goodman, Ex'r, to Charles Butler, dated September 27, 1852, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 25. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence a receipt from W. Goodman, Ex'r, to Charles Butler, dated September —, 1852, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 26. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence a draft by James H. Anderson on Charles Butler, dated March 8, 1861, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 27. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence letter of W. Goodman to Charles Butler, March 2, 1854, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 29. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence letter of Butler to Goodman, March 2, 1860, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 31. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence letter of Goodman to Butler, March 19, 1860, a copy of which is hereto attached

and made a part hereof, marked Exhibit No. 35. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence letter of Butler to Anderson, May 7, 1860, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 36. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence letter of Butler to Anderson, August 9, 1860, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 38. (Objected to; overruled; plaintiff excepted.)

Defendants likewise offered and read in evidence letter of Butler to Anderson, February 1, 1861, a copy of which is hereto attached and made a part hereof, marked Exhibit No. 39. (Objected to; overruled; plaintiff excepted.)

Thereupon, both plaintiff and defendants rested.

The above and foregoing, together with the exhibits hereto attached and made a part hereof, is all of the evidence either offered or received on this trial of this cause.

Thereupon, defendants moved the court to direct a verdict for each of said defendants, which motion, after arguments by counsel, was granted by the court, to which plaintiff excepted.

84 Thereupon, the court directed the jury to return a verdict for defendants, and each of them, and against plaintiff, and thereupon the jury, in obedience to said direction, returned a verdict in favor of each of said defendants, and against plaintiff; and to the granting of said motion and the verdict aforesaid plaintiff at the time separately excepted.

Within three days plaintiff filed his written motion to set aside said verdict and for a new trial of this cause for the reasons therein stated, which motion coming on to be heard, was overruled by the court at the January term of this court, on the 31st day of March, 1906, and judgment rendered against plaintiff on said verdict; to each and every of which plaintiff at the time separately excepted.

Now comes plaintiff by his counsel, and presents this his bill of exceptions taken on this trial of this cause, which he says may be allowed, signed, sealed, and made a part of the record; which is accordingly done this 8th day of May, 1906.

JULIAN H. TYLER. [SEAL.]
Trial Judge.

Received this bill of exceptions May 7, 1906.

JULIAN H. TYLER,
Trial Judge.

Common Pleas Court of Lucas County, Ohio.

PETER ANDERSON, Plaintiff,
vs.
THE UNITED REALTY COMPANY, THE DOW-SNELL COMPANY, JOHN P. Freeman, Charles R. Messinger, Rosewell E. Messinger, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson, Mary E. Nearing and The Joseph Schlitz Brewing Company, Defendants.

Exhibits Attached to and Made Part of the Foregoing Bill of Exceptions and Therein Referred to.

Stipulation.

(Filed April 25, 1906.)

EXHIBIT No. 1.

In the above entitled cause it is agreed by and between the parties to this action as follows, viz:

1st. That on the 19th day of May, A. D. 1838, at the time of the execution of the mortgage, hereinafter mentioned, on the land involved in this case, by Edward Bissell and his wife, Jane A. M. Bissell of the city of Toledo, Ohio, to Charles Butler of the city of
85 New York, the said Edward Bissell was the owner in fee simple, had the legal title to and was entitled to and in the actual possession of the real estate described in said mortgage, including all of the real estate involved in this action and at the time of the execution of said mortgage there was and now is a regularly executed chain of conveyances in fee simple for said real estate from the government of the United States down to the said Edward Bissell.

2. That on the 19th day of May, A. D., 1838, said Edward Bissell and Jane A. M. Bissell of the city of Toledo, Ohio, signed, sealed, executed, acknowledged and delivered in due form of law to Charles Butler of New York City, their mortgage deed of said date when and whereby they did duly grant, bargain, sell and convey to the said Charles Butler, his heirs and assigns forever in fee simple, among other lots and parcels of land, all of the real estate involved in this action to secure the payment of the bond of said Edward Bissell to the said Charles Butler executed on the same date for $21,500.00, payable at the office of the Manhattan Company of the city of New York, within one year from the date of said mortgage, with interest at the rate of seven per cent per annum, which mortgage was attested by two witnesses and was duly acknowledged according to law, which mortgage was afterwards duly filed for record May 19, 1838, and recorded by the recorder of Lucas county, Ohio, on June 7th, on pages 267 and 269 inclusive of Volume No. 2 of the public record of mortgages kept and recorded in the recorder's office of Lucas county, Ohio.

That afterwards on September 23, A. D. 1841, the said Charles

Butler made an assignment of said mortgage to said Henry Anderson in the words and figures following, to-wit, viz:

"Assignment: I hereby assign this mortgage to Henry Anderson on certain trusts set forth in a deed this day made. September 23, 1841. Charles Butler."

Which assignment was duly recorded on the margin of the record of said mortgage, in Lucas county, Ohio, on September 30, A. D. 1843.

3d. That on the 19th day of September, A. D. 1843, said Henry Anderson claiming to be the assignee of said mortgage executed by said Edward Bissell and wife to said Butler filed his bill in chancery in the court of common pleas of Lucas county, Ohio, on the chancery side of said court to foreclose the aforesaid mortgage; the said Henry Anderson was complainant in said action and Edward Bissell, Jane A. M. Bissell, Frederick Bissell, Sidney Bissell and Charles Butler, were named as defendants in said bill; that said Henry Anderson by his said bill, alleged and set forth the execution by said Edward Bissell and Jane A. M. Bissell, his wife, of the said bond and mortgage, and the non-payment thereof, and said bill in no way made any allegations against the said Charles Butler, except to allege the assignment of said mortgage by the said Charles Butler, to the said Henry Anderson, in words and figures as follows:

86

"Your orator further represents that on the 23d day of September in the year of our Lord 1841, the said mortgage and bond was duly transferred and assigned to your orator by the said Charles Butler."

The only prayer or relief asked for in said bill is in the words and figures following, to-wit, viz:

"Your orator therefore prays that the writ of subpœna may issue against the said Edward Bissell, Jane A. M. Bissell, Charles Butler, Frederick Bissell and Laverett Bissell that they may be compelled to answer all and singular the premises, that an account may be taken of what is due to your orator for his principal and interest aforesaid; that said Frederick Bissell, Sidney Bissell, Charles Butler, Jane A. M. Bissell may be forever barred and foreclosed of and from all right and equity of, in and to said mortgaged premises, and that your orator may have such other and further relief in the premises as equity and good conscience may require."

That all the defendants in said action, except Charles Butler, were either duly served with subpœna or entered their appearance in said action, but the said Charles Butler was not served with subpœna or other process, and in no manner entered his appearance in said action, and the said court in said action in no manner acquired jurisdiction over said Charles Butler; that afterwards on the first day of April, in the year A. D., 1844, a decree was duly entered in said action ordering the said premises to be advertised and sold according to law for the payment of the $29,139.01 found due the complainant, Henry Anderson, on said bond and mortgage from the defendant, Edward Bissell; and one Edson Allen, master commissioner in chancery in said court, was appointed to sell said premises, and that afterwards the said master commissioner in pursuance of the decree of the court in said action sold the real estate involved in said action including all the real estate involved in this action to the complain-

ant, Henry Anderson, at the price of $6,921.00, which sale was afterwards duly confirmed by the court and the said Edson Allen
87 as said master commissioner making said sale was ordered by said court to convey said real estate in fee simple to the said purchaser, Henry Anderson, his heirs and assigns forever, and that afterwards on the 18th day of November, 1844, the said Edson Allen as such master commissioner, in pursuance of the decree rendered in said action of said sale and the confirmation thereof, and in pursuance of the order of said court, did execute his master commissioner's deed to the said Henry Anderson, dated the 18th day of November, 1844, whereby the said master commissioner conveyed to the said Henry Anderson his heirs and assigns forever, all the real estate involved in said action and all the real estate involved in this action, which deed was afterwards duly filed for record with the recorder of Lucas county Ohio, and by him duly recorded on page 168 of volume 10 of the public record of deeds, kept in the recorder's office of Lucas county, Ohio.

That all the proceedings in said foreclosure suit were regular and legal, excepting the failure or omission to serve said Charles Butler with subpœna, or in some manner acquire jurisdiction as to him, which plaintiff does not admit to have been necessary.

That the sale of said real estate by Edson Allen, master in chancery, as aforesaid, to Henry Anderson, was on the 24th day of September A. D. 1844. That after said sale the said Henry Anderson and Charles Butler entered into a written contract, a copy of which is hereto attached, marked "Exhibit A" and hereby made part hereof.

4th. That Henry Anderson, at the time of his death, was a resident of Holly Springs, Marshall county, of the state of Mississippi; that said Henry Anderson made and executed his last will and testament, dated the 28th day of February, A. D. 1846, and afterwards on the 3d day of April, of said year died, after which his last will and testament was duly probated in and by the probate court of Marshall county, Mississippi, which said court by the laws of the state of Mississippi had jurisdiction to probate said will, which afterwards was recorded in said probate court as the last will and testament of the said Henry Anderson, deceased, and that afterwards a duly authenticated copy of said last will and testament with the proceedings admitting it to probate and record, taken from the records of said probate court of Marshall county, Mississippi, was filed in the probate court of Lucas county, Ohio, and by it was duly admitted to probate and record on April 20, 1860, as a will from another state, and then and thereby became and now is the last will and testament of the said
88 Henry Anderson, deceased, and is in full force and effect; a true, full and correct copy of said will is hereto attached, marked "Exhibit B," and hereby made a part hereof.

5th. That the said Henry Anderson, upon his death, left surviving him, his two sons, his only heirs at law, to-wit: William Anderson, born February 12, 1828, and James H. Anderson, born June 25, 1831; that said William Anderson died intestate January, A. D. 1850, unmarried and without issue; that the father and mother of

said Henry Anderson had each died prior to the time he made his said will.

6th. That said James H. Anderson, surviving son of Henry Anderson, died intestate at the city of Memphis, in the state of Tennessee, on September 16, A. D. 1902, leaving surviving as his only child, and only heir at law, the plaintiff, Peter Anderson, who was born August 27, 1859, and who is the grandson and only grandchild and only living descendant of the said Henry Anderson, deceased.

7th. That at the time of the commencement of this action the defendants, The United Realty Company, The Dow & Snell Company, John P. Freeman, Charles R. Messinger, Rosewell E. Messinger, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson and Mary E. Nearing, were severally in the possession of the parts of the real estate involved in this action described in their several answers and hereinafter more fully described, and excepting the defendant, The United Realty Company, had been in such possession and had received the rents of the several properties possessed by them respectively since the 16th day of September, A. D. 1902, and the United Realty Company had been in the possession of the part claimed by it and received the rents and profits thereof since the — day of ——, A. D. 1904, and that each of said defendants at the commencement of this action was keeping the plaintiff out of the possession of the lots and lands possessed by such defendants respectively, and hereinafter particularly described; but neither was in possession and has not received the rents or profits and has not kept plaintiff out of the possession of, and is not and never was interested in any other lot or parcel of land involved in this action.

8th. That Peter Anderson and Walter Goodman of Holly Springs, Mississippi two of the executors of the will and trustees of the estate of Henry Anderson, deceased, executed a deed purporting to convey to said Charles Butler, all the real estate involved in this action, which deed was duly signed, sealed, acknowledged and executed
89 by said Peter Anderson and Walter Goodman as said executors and trustees according to the laws of the state of Ohio, in the presence of two witnesses, who signed as such and said deed was dated October 1, 1855, and was recorded on May 2, 1860, on page 110 of volume 31 of the record of deeds of Lucas county, Ohio; a copy of said deed is hereto attached and marked "Exhibit C," and hereby made a part hereof; that shortly after the date of said deed, said executors and trustees placed said deed in the hands of Caleb O. Halstead, then the president of the bank of the Manhattan Company, in the city of New York, with instructions to deliver the same to Charles Butler upon the payment by him of the balance due upon Charles Butler's note for $20,000.00 herein referred to.

That sometime prior to May 1, 1860, the said executors and trustees made a settlement of said trust with James H. Anderson and turned over to him all of the estate in their hands belonging to him, and then directed the said Caleb O. Halstead and the said The Manhattan Bank to turn over to James H. Anderson any payments which might thereafter be made to said bank by said Butler upon his said

note, and that any payments thereafter made upon said note were so made and turned over to James H. Anderson, and that the said deed of the said executors was not delivered by said Halstead of said bank to the said Charles Butler until about the first day of May, A. D. 1860; that said executors and trustees did not at any time execute any conveyance to said James H. Anderson or turn over to him or put him in possession of any of the lands described in the said deed to said Charles Butler, of which the lands involved in this action are a part.

That the facts in this clause stipulated shall not preclude either party from offering other evidence modifying, limiting or qualifying any fact in this clause stated, including evidence establishing the delivery of said deed to said Halstead or said bank as an escrow.

9th. That Peter W. Lucas, one of the executors of the will and trustees of the estate of Henry Anderson, deceased, executed a deed purporting to convey to said Charles Butler, all the real estate involved in this action, which deed was duly signed, sealed, acknowledged and executed by said Peter W. Lucas, as said executor and trustee according to the laws of the state of Ohio, in the presence of two witnesses, who signed as such, was dated the 16th day of April, 1860, was delivered on or about May 1, 1860, and was received for record May 2, 1860, and was recorded May 3, 1860, on page 112 of volume 34 of the record of deeds of Lucas county, Ohio, a true, full and correct copy of which deed is hereto attached, marked "Exhibit D," and hereby made a part hereof.

10th. That on or about October 10, 1849, said William Anderson of Holly Springs, Mississippi, one of said sons of Henry Anderson, deceased, and the uncle of plaintiff, duly executed a certain agreement in writing relating to the real estate involved in this action; that said agreement was also duly executed by Charles Butler and attested by S. H. Fleetwood, a full, and true copy of said agreement being hereto attached, marked "Exhibit E," and is hereby made part hereof.

11th. That on or about September 16, 1851, said James H. Anderson, of Holly Springs, Mississippi, the then only surviving son of Henry Anderson, deceased, and the father of plaintiff, executed, acknowledged and delivered a certain written contract to said Charles Butler, bearing said date, and relating to the real estate in controversy in this cause, a full and true copy of said agreement and the official acknowledgments thereof being hereto attached and marked "Exhibit F," and hereby made a part hereof.

That on or about the 7th day of April, 1860, James H. Anderson of Holly Springs, in the state of Mississippi, the then surviving son of Henry Anderson, deceased, and the father of plaintiff, executed a quitclaim deed purporting to convey to the said Charles Butler all the real estate involved in this action, which said deed was duly signed, sealed, acknowledged and executed by the said James H. Anderson, in the presence of two witnesses who signed said deed as such, which deed was received for record May 2, 1860, and was duly recorded in Lucas county, Ohio, on May 3, 1860, a true, full and cor-

rect copy of said deed is hereto attached, marked "Exhibit G," and hereby made a part hereof.

12th. That on March 13, 1843, said Edward Bissell and Jane A. M. Bissell, his wife, of Toledo, Ohio, and Sidney Bissell of the same place, made, executed, acknowledged and delivered their quitclaim deed dated February 22, 1843, to Charles Butler of New York City, of all the real estate involved in this action, which deed was attested by two witnesses, who signed as such and was duly filed for record October 11, 1849, and recorded on October 13, 1849, on page 446 of volume 16 of the public records of deeds kept and recorded in the recorder's office of Lucas county, Ohio, a true, full and cor-
91 rect copy of said deed is hereto attached, marked "Exhibit H," and hereby made part hereof.

13th. That after Peter W. Lucas and Walter Goodman, were appointed and qualified as executors of the will and trustees of the estate of Henry Anderson, deceased, they made an inventory of the personal assets of said estate and included therein the note executed by said Charles Butler to Henry Anderson for $20,000.00, dated July 1, 1841, and thereafter duly filed said inventory in the probate court of Marshall county, Mississippi, where the said Anderson resided at the time of his death as required by the laws of said state.

That thereafter the said Charles Butler made sundry payments upon said note to said executors and the said executors included in their annual reports and settlements in said court with said estate the sundry payments made by said Butler to said executors on such note as follows, viz:

October 10, 1849, paid 5th report	$3,376.52
October 10, 1849, paid 5th report	2,700.00
October 1, 1851, paid 5th report	1,110.00
October 1, 1852, credit by commission, 7th report	5,967.49
October 1, 1852, by interest on same, 7th report	1,551.42
October 1, 1852, 7th report	2,000.00
October 1, 1852, 7th report	1,669.96
May 4, 1855, 9th report	3,000.00
October 30, 1855, paid principal, 10th report	4,340.00
October 30, 1855, paid interest, 10th report	1,027.60
	$26,742.03

The foregoing statement shall not be construed to be an admission by the defendants that the foregoing were all of the payments made by said Butler, but the said defendants shall be at liberty to introduce evidence of additional payments on said note.

14th. That on or about September 21, 1841, said Charles Butler and said Henry Anderson duly executed a written agreement, bearing said date and relating to the division between them of certain commissions arising out of their real estate transactions, a full and true copy of which agreement is hereto attached, marked "Exhibit I," and is hereby made a part hereof.

15th. That the said Butler executed, acknowledged and delivered

a warranty deed for the lots or parcels of land now claimed and possessed by the defendants in this action, to their respective
92 ancestors or grantors as follows, namely:

1st. On April 23, A. D., 1860, said Charles Butler executed and delivered his deed to Calvin Bronson of Toledo, Ohio, of all of lots 18, 19, 20, 21, 30, 31, 32, 33, 34, 1000 and 1001 of the Vistula division of the city of Toledo, Ohio, excepting that part thereof claimed and possessed by the defendant, John P. Freeman, hereinafter more particularly described.

2nd. On August 6, A. D., 1860, said Charles Butler executed, acknowledged and delivered a deed to John P. Freeman, senior, the father of defendant John P. Freeman, of lot eighteen (18), the southeasterly nineteen (19) feet of lot nineteen (19) and the northwesterly eight (8) feet of lot one thousand and one (1001) in and of the Vistula division *to* the city of Toledo, Ohio, excepting a strip of land two and one-half ($2\frac{1}{2}$) feet wide off from the northeast end of said premises, being a parcel of land sixty (60) feet front on the northeast side of Lynn street and extending northeasterly at right angles to said street eighty (80) feet.

3rd. On February 17th, A. D., 1863, said Charles Butler executed acknowledged and delivered a deed to Washington Hunt and Hiram Walbridge of lot No. nine hundred and ninety-two (992), in and of the Vistula division *to* the city of Toledo, Ohio.

16th. That shortly after said deeds to them respectively and in the same year of the date of said deeds, the said Calvin Bronson, John P. Freeman, senior, and Washington Hunt and Hiram Walbridge each entered upon the said several premises described in their said respective deeds, claiming said lands respectively under their several deeds, and made large and valuable improvements on the said several premises deeded to them by the said Butler.

17th. That the defendants, The United Realty Company, The Dow & Snell Company, Charles R. Messinger, and Rosewell E. Messinger, claiming under said Calvin Bronson, are each in the possession of the parts of said real estate deeded by the said Charles Butler to said Calvin Bronson described in their several answers in this case, and that all the right, title and interest of the said Calvin Bronson in said several parcels of real estate described by said defendants in their several answers has heretofore passed to, vested in and is now owned by the said respective defendants in severalty, and that the said defendants and those under whom they claim title, including said Calvin Bronson have been in the open, exclusive, notorious, continuous possession of said several premises,
93 possessed by them, claiming said land under said Butler's said deed, ever since the date thereof down to the commencement of this action.

That the defendants, Charles R. Messinger and Rosewell E. Messinger, are the grandsons of the said Calvin Bronson, and derive their title to the premises claimed by them respectively by inheritance from their grandfather, the said Calvin Bronson and the said The Dow & Snell Company and the United Realty Company derive their several titles to the said premises claimed by them by convey-

ances from a granddaughter of said Calvin Bronson, who inherited her interest in said premises from her grandfather, Calvin Bronson.

That the said parts of said real estate possessed and claimed by the defendants, The United Realty Company, Charles Ruel Messinger, Rosewell E. Messinger and the Dow & Snell Company, are as follows, viz:

The United Realty Company.

1st. Lot No. 34 and the northeasterly 2½ feet of lot 18 of the Vistula division; also all that part of lots Nos. 1000 and 1001 of the Vistula division described as follows: Commencing at the northeast corner of said lot 1000 at the junction of Cherry street and Water street of said city and running thence southwesterly along the northwesterly line of Water street 100 feet; thence northwesterly parallel with Cherry street fifty feet; thence northeasterly parallel with Water street 100 feet to the southwest line of Cherry street; thence southeasterly along the southwest line of Cherry street fifty feet to the place of beginning, being a parcel of land fifty feet front on Cherry street by 100 feet on Water street.

Charles Ruel Messinger.

2nd. Lot No. 33 of the Vistula division *to* the city of Toledo, Ohio.

Rosewell E. Messinger.

3rd. The northeast 2½ feet or lot No. 18; lot No. 19 except southeast nineteen feet of the southwest eighty feet thereof, and lot 21.

The Dow & Snell Company.

4th. All of lots 1000 and 1001 of the Vistula division, excepting the southwesterly eighty feet *of* the northwesterly eight feet of lot No. 1001 and also *excepting* the following described tract, viz: Commencing at the northeast corner of lot No. 1000 at the junction of Cherry street and Water street of said city and running thence southwesterly along the northwesterly line of Water street 100 feet; thence northwesterly parallel with Cherry street fifty feet; thence northeasterly parallel with Water street 100 feet to the south-
94 west line of Cherry street; thence southeasterly along the southwest line of Cherry street fifty feet to the place of beginning; being a parcel of land fifty feet front on Cherry street by 100 feet on Water street.

18th. That the defendant, John P. Freeman, is the son of John P. Freeman, senior, hereinbefore mentioned, and has heretofore inherited and now owns all the right, title and interest in the above described premises conveyed by Charles Butler to his father, John P. Freeman, senior.

That the defendant, John P. Freeman, claiming under said John P. Freeman, senior, is in the possession of the said real estate and that the defendant, John P. Freeman, and those under whom he

claims including his father, John P. Freeman, senior, claiming said land under said Butler's deed, has been in the open, exclusive, continuous possession of said premises possessed by him since the date of the said Butler deed to said John P. Freeman, senior, down to the commencement of this action.

19th. That the defendants, Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson and Mary E. Nearing respectively claiming under said Washington Hunt and Hiram Walbridge, are each in possession of the respective parts of said lot No. nine hundred and ninety-two (992) of the Vistula division of the city of Toledo, Ohio, described as follows:

Aaron Chesbrough.

1st. A strip of land off from the southwest side of lot No. 992 of the Vistula division to the city of Toledo, Ohio, running from Water street, southeasterly to the dock line of the Maumee river, which is 10.32 feet front on Water street and 12.32 feet front on the dock line, and bounded on the southwest side by the southwest side of said lot and on the northeast side by a straight line.

Clarence M. Lamb and Edward H. Thompson.

2d. The southwest 54.50 feet of the northeast 77.34 feet of said lot 992 of the Vistula Division to the city of Toledo, Ohio, being 54.50 feet front on the southeast side of Water street and extending southeasterly to the Maumee river.

Mary E. Nearing.

3rd. The southwesterly thirty-nine feet of the northeasterly 116.34 feet of said lot No. 992 of the Vistula division to the city of Toledo, Ohio; being a parcel of land thirty-nine feet front on the southeasterly side of Water street and extending southeasterly to the Maumee river.

And that all the right, title and interest of the said Washington Hunt and Hiram Walbridge in said several parcels of real estate claimed by said defendants respectively has heretofore been deeded to, vested in and is now owned by the said respective defendants in severalty, and that the said Aaron Chesbrough, Clarence M. Lamb, Edward H. Thompson and Mary E. Nearing respectively, and those under whom they claim title to their several portions including the said Washington Hunt and Hiram Walbridge have been in the open, exclusive, notorious and continuous possession of said premises possessed by them respectively claiming the said respective parcels of said land under said deed from said Charles Butler, since the date of the said deed to the said Washington Hunt and Hiram Walbridge.

20th. That all the letters written and sent by Charles Butler of New York City to Henry Anderson of Holly Springs, Mississippi, Walter Goodman, Peter Anderson and James H. Anderson of the same place, or either of them, and the letters from the Manhattan

Bank of New York City, Caleb O. Halstead and Stanley H. Fleetwood, to said parties or either of them, and the accounts, documents, statements and schedules accompanying and mentioned in said letters are lost or destroyed.

That subject to such objections as to competency, relevancy and materiality as might be made against the originals were they in existence and duly produced and proven in open court, the letter press copies of said letters, accounts, statements and schedules, kept by Charles Butler and now in the possession of the defendants may be read in evidence on the trial of this case with the same force and effect as the originals would have were they in existence, produced and proven in open court. But no admission is hereby made as to the competency of the originals were they produced as aforesaid, but such competency and relevancy is to be first determined by the court.

21st. That Charles Butler of New York City under whom the defendants claim title to the real estate involved in this action, died at his home in the city of New York, on December 13, 1897; that the written instruments, books, documents, statements, letters, press copies of letters and statements and all other instruments, described in "Exhibit J," hereto attached and hereby made a part hereof, were each and all at or shortly after the death of said Charles Butler found amongst and with the family and other papers of said Charles Butler; that each and all of said instruments were at all times after the death of said Charles Butler, until shortly before the commencement of this case, in the possession and custody and under
96 the control of Miss Emily O. Butler, the only surviving child and sole heir at law of said Charles Butler, deceased; that shortly before the commencement of this case, said Emily O. Butler delivered each and all of said instruments to her cousin, Mr. Willard Parker Butler, at his law office No. 59 Wall street, in the city of New York, New York, and that each and all of the instruments described in said "Exhibit J" are now produced by him; that each and all of said written instruments, books, documents, statements and other instruments, described in said "Exhibit J" were written prior to January 1, 1861, and more than thirty years before the commencement of this cause; that to avoid the taking of depositions herein and thus subserve the mutual convenience of both parties hereto and reduce the expenses of said parties, each and all of said instruments, described in said "Exhibit J" shall, upon the execution hereof, be delivered to Mr. Oliver B. Snider, attorney at law of Toledo, Ohio, to be kept in his custody and under his control until said instruments, or any of them, shall be desired by either of the parties hereto for use upon the trial of his case, when same shall be produced by him for such use, and any further or other proof whatsoever with respect to the genuineness and authenticity of any and all of said instruments described in said "Exhibit J" shall be and hereby is dispensed with, and said instruments, or any of them, described in said "Exhibit J" may be offered in evidence at the trial of this cause by either of said parties without formal notice to produce them, or any of them, and such notice being

hereby waived, any such offer, however, of any of said instruments to be subject to objections for want of competency or relevancy for reasons other than the genuineness and authenticity of said instruments, or of any of them, or the omission to give formal notice to produce same.

22d. That Stanley H. Fleetwood, formerly of the city of New York, was for many years the confidential clerk for Charles Butler, and certain of the letters described in "Exhibit J" purporting to have been written and signed by him, either in his own name or on behalf of Charles Butler, are in the handwriting of said Fleetwood.

23d. It is further agreed that the said Miss Emily O. Butler and her cousin, Willard Parker Butler, have each made thorough search among the papers, books and documents of the said Charles Butler, deceased, for the said note of $20,000.00 executed by the said Charles Butler to Henry Anderson to secure which the said Charles Butler assigned the Bissell mortgage hereinbefore referred to; that said note was not found among said papers, books or documents,
97 nor has the same ever been seen by the said Miss Butler or her said cousin, but that among Mr. Butler's papers, some time prior to the year 1904, there was found an envelope marked "Anderson settlement," or something substantially to that effect, containing what appeared to be some letters, accounts and other papers, which said envelope and its contents were destroyed with other papers, all then supposed to be of no value. Of the contents of said envelope nothing further is known.

24th. It is further stipulated that Caleb O. Halstead, who is referred to in the letters described in "Exhibit J" was during his lifetime the president of the bank of the Manhattan Company, of the city of New York, and has been dead for many years; that Willard Parker Butler, with the cashier of the Manhattan National Bank of New York City, the successor of the said Manhattan Bank, has made careful and diligent search among the books, papers and records of said Manahttan National Bank of New York, as to the existence of the deed referred to in the correspondence set forth in "Exhibit J," as having been left with said Halstead at the Manhattan Bank, and no record of information concerning the same could there be found or obtained. That it was, and has been, the custom of said two banks every ten years to destroy their old letters.

25th. That the misjoinder of causes of action in plaintiff's petition, if such there be, are hereby waived by the defendants and all the parties to this action do hereby consent and agree to try together all the causes of action set forth in plaintiff's petition.

That this cause shall be first tried upon the right to recover the real estate described in what is denominated in the petition as the first cause of action, and that the trial of the second cause of action of plaintiff's petition, being the cause of action for the recovery of the rents and profits shall be continued until after the determination of the right to recover the real estate. If plaintiff succeeds in the recovery on the first cause of action, the journal entry shall show that the cause is reserved for further determination as to said second

cause of action, but if the plaintiff fails in the recovery of the real estate then the journal entry shall dismiss the petition as to both the first and the second causes of action, without prejudice to the right of plaintiff to prosecute error from the judgment that may be entered herein.

The foregoing statement of facts or any part thereof may be used and read in evidence at the trial of this action by either party in lieu of the proofs of the matters herein stated, with the same
98 force and effect that the proof of said facts would have were the same offered and proven in open court in the regular and ordinary way, and subject to any and all objections and exceptions as to competency, relevancy and materiality that might be made against such proof and facts were they offered in the regular way in open court. The said parties are at liberty to offer additional proofs of the foregoing or other facts in this action in support of their respective titles, subject to the same objections and exceptions.

In witness whereof the parties do hereunto sign their names to duplicates hereof on the second day of January, A. D. 1906.

PETER ANDERSON,
By C. A. THATCHER AND R. P. CARY,
His Attorneys.
CHARLES R. MESSINGER,
By C. W. EVERETT,
His Attorney.
THE UNITED REALTY CO.,
By C. W. EVERETT,
Its Attorney.
AARON CHESBROUGH,
By O. B. SNIDER, *His Attorney.*
THE DOW & SNELL COMPANY,
By ELMER E. DAVIS, *Its Attorney.*
JOHN P. FREEMAN,
By RHOADES & RHOADES, *Attorneys.*
MARY E. NEARING,
By RATHBUN FULLER, *Her Attorney.*
CLARENCE M. LAMB AND
EDWARD H. THOMPSON,
By GEO. A. BASSETT,
Their Attorney.
ROSEWELL E. MESSINGER,
By KING & TRACEY, *His Attorneys.*
THE UNITED REALTY COMPANY,
By KING & TRACEY AND
C. W. EVERETT,
Its Attorneys.

"EXHIBIT A."

Whereas Charles Butler of the city of New York, as collateral security for the payment of his note in favor of Henry Anderson of Holly Springs, in the state of Mississippi, for twenty thousand dollars, heretofore duly assigned to the said Henry Anderson, a certain bond executed by Edward Bissell of Toledo, in the county of Lucas, and state of Ohio, bearing date the 19th day of
99 May, 1838, and conditioned for the payment of twenty-one thousand five hundred dollars, in one year from the date thereof with interest, together with a certain mortgage collateral to said bond executed by the said Edward Bissell and Jane A. M., his wife, on certain lots of land, lying in the Port Lawrence division of Toledo, aforesaid, in said mortgage particularly specified, and whereas default having been made in the payment of the moneys intended to be secured by said bond and mortgage, such proceedings in relation thereto have been taken in the name and behalf of the said Henry Anderson, the assignee of said bond and mortgage, that an order for the sale of the premises embraced in said mortgage has been duly made and confirmed; and whereas also a decree or judgment has been or may be obtained in favor of the said Henry Anderson against the said Edward Bissell personally, for the amount of such deficiency as may be due on said bond and mortgage after the sale of the mortgaged premises.

And, whereas the said Charles Butler, as a farther collateral security for the payment of his said note, in favor of the said Henry Anderson, has heretofore duly assigned to the said Henry Anderson five hundred and forty-six shares of the capital stock of the Erie and Kalamazoo Railroad Company, of the par value of fifty dollars per share.

And, whereas the said Henry Anderson, at the instance and request of the said Charles Butler, and in consideration of the covenant of the said Charles Butler, hereinafter contained, is willing to relinquish and surrender to the said Charles Butler, the collateral securities, so assigned as aforesaid, for the payment of said note of twenty thousand dollars, so far as the same may be done without prejudice or injury, to the order obtained for the sale of the said mortgaged premises, and the rights of the said Henry Anderson under the same, and without prejudice to the personal liability of the said Charles Butler, to the said Henry Anderson on the principal debt.

Now, therefore, these presents witness, that in consideration of the premises and for the purpose of giving effect to the same, the said Henry Anderson has on the day of the date hereof executed and delivered a power of attorney to the said Charles Butler, empowering and authorizing him fully and effectually, if he shall see fit to do so, to release and discharge the said Edward Bissell of and from all personal claim, demand or liability, whatsoever, for or on account of the said bond and mortgage, but without prejudice to

the proceedings, which have been or may be adopted, to
100 effect the sale of the said mortgaged premises, and that the said Henry Anderson has also, by instrument in writing, released and transferred to the said Charles Butler, the said five hundred and forty-six shares of Erie and Kalamazoo Railroad Company stock.

And the said Charles Butler, in consideration of the surrender and relinquishment of the said securities, hereby covenants and agrees to and with the said Henry Anderson, that the same shall not be held or construed in any way to affect or impair the liability of him, the said Butler, on the said note for twenty thousand dollars, and the said Charles Butler also covenants and agrees to and with said Henry Anderson that he, the said Butler, will well and faithfully apply and pay over to the said Henry Anderson, on account of the said note, all sums of money or other valuable consideration, which he, the said Butler, may receive or derive, by reason of the surrender and relinquishment of the securities aforesaid, by him, the said Henry Anderson.

In testimony whereof the said Henry Anderson and Charles Butler have hereunto respectively set their hands and seals, in duplicate this fourth day of October, in the year one thousand eight hundred and forty-four.

In presence of

(Signed) S. H. FLEETWOOD.
(Signed) HENRY ANDERSON. [SEAL.]
CHARLES BUTLER. [SEAL.]

"EXHIBIT B."

I, Henry Anderson, do make and ordain this to be my last will and testament. I declare my domicile to be the town of Holly Springs, Marshall county, state of Mississippi. I revoke the will made by me on the 3rd of March, 1837, and all other wills, if any there be.

Item. I give, devise and bequeath to Peter Anderson, Walter Goodman and Peter W. Lucas, all my property, both real and personal, legal and equitable in possession, reversion or remainder, and all claims and demands whatsoever, except such right, title or claim to lands, money or choses in action, as I may be entitled to as one of the agents of the American Land Company and as one of the stockholders in said company; this property they shall hold in trust and if one or more of them die, the survivors or survivor shall hold in trust for the following purposes: they shall pay my debts, other than such as may be owing to the American Land Company, out of moneys on hand and such property as may be sold least injurious to my estate. I wish them to collect debts due to me, and apply
to this purpose. They may, if they think fit, and can, ob-
101 tain an extension of time on any debts, and they may pledge my property to raise money to pay debts. They may sell for cash or on credit, and if at any time, they have funds on hand not required for debts or legacies, they may invest the

same. They shall have full power to make titles for property sold and to pay charges for preservation and in all respects have the power of owners but always as trustees. I have entire confidence in each of them and therefore I give each the power of all, so that each may do separately what all acting together may do, except in making investments; in that I wish all to join. The annual accounts of my said trustees signed by their respective names shall be binding on my heirs and shall be conclusively so unless error or fraud be clearly established. I have directed the payment of debts, other than what I may owe the American Land Company. I exclude the debt to the company because that is subject to an account with the company and I do not wish my trustees to make payments before that account is adjusted. The adjustment of that account, and the direction and management of the affairs of the company so far as I have power, right or interest, I place in the hands of Peter Anderson and Walter Goodman and when they have finally closed it, it shall become a part of the trust created by this article of my will and subject to the control of my said trustees. By saying "it shall become a part of the trust" I mean the effects and proceeds that I may be entitled to as stockholder and agent of the company.

Item. As agent of the American Land Company jointly with my brother, I am entitled to an account with the trustees and it is my will that this claim for an account, and all rights, claims and powers growing out of any contract or contracts with the trustees do vest in Peter Anderson and Walter Goodman as I have before said. They shall have power to settle with the trustees immediately or at such time as they may think best, and they shall be entitled to receive conveyances of land, should a division of land take place, and should the notes of the company be divided, they shall be entitled to receive the same. The lands they may receive shall be taken to them as trustees of this my will. They shall have power to execute all papers necessary for a settlement of the agency and all papers executed by them shall be binding on my heirs. When this business is finally closed I direct that they make out and sign a schedule of the property received on account of said interest and an account explanatory of the settlement, and the same shall

102 be taken as a proper inventory and the property therein contained shall thereafter become vested in my trustees created by the first clause of my will. But if there be real estate therein contained, and the same stand in their name, as trustees, that is in the name of Peter Anderson and Walter Goodman as above stated, a title from them shall be good and sufficient to a purchaser. My intention being that this interest shall only come under the administration of the trustees first created and my executors hereinafter named, from and after the time such interest is ascertained by a final close with the company. I have acted as agent for the trustees of the American Land Company in respect to the lands of the company in the state of Arkansas and elsewhere. What may be due me for such services is a claim that I desire to go to the said Peter and Walter and not to my trustees first named. It forms a portion of my claims against the company which I wish settled

on the final settlement with them. I suppose I have made myself fully understood, but for greater certainty I repeat that my wish is that nothing be taken from the company—interest for debts or legacies unless for such debts as are connected with the company. At the same time if my other property cannot pay my debts or cannot pay them without injury, and it be found that it would not be unjust to withdraw funds from the company interest, then it may be done, not otherwise. When my interest in the company is finally ascertained, it shall, as I have said, become a part of the trust first created, and the said Peter W. Lucas shall indorse his acceptance of the schedule of the two trustees who have signed it. I give to each, that is, to Peter Anderson and Walter Goodman severally the same powers that both are invested with. In both of the trusts created by this will my trustees shall not be required to give security, nor shall they be liable for each other and their accounts signed by them respectively shall be evidence binding on my heirs of the correctness unless error or fraud be clearly shown.

Item. It is my will that when my son William arrives at the age of twenty-one years the trustees of the first and general trust shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one-half of my property reserving thereout two-fifths parts of said moiety, by valuation which my said trustees shall hold in trust and properly invest and pay over to him at the age of twenty-five years. If my interest in the American Land Company be not brought into the general trust at the time
103 William becomes twenty-one, but is brought in any time before he arrives at twenty-five, so soon as brought in, two-fifths shall be deducted therefrom, and invested and paid over to him at twenty-five, the other three-fifths he shall have as soon as paid in. I find the above does not express my will in this: when I say two-fifths shall be deducted from the interest I may have in the Land Company for investment, and three-fifths to be paid to him, I mean two-fifths of a moiety shall be deducted and three-fifths of a moiety paid over.

And it is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective period- of twenty-one and twenty-five years of age, being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the regulations laid down concerning the same.

If either of my sons die without lineal descendants the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants then one-half both of the decedents original portion as well as one-half of the portion taken by survivorship shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother, Peter, be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall

go to his children living at the time of the decease of my said son, and if there be no children surviving, then the share shall go to my other brother and sisters surviving at the time of such decease of my son. I make the following explanation: The limitations over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will of their attaining the age of twenty-one years respectively. The above limitations over shall give way to the provision of such wills.

Item. I entered into a contract with the American Land Company to warrantee title to such lands of the company as might be sold, and it so is that many titled bonds are now out binding me to such warrantees, I give to Peter Anderson and Walter Goodman or either of them the power to execute deeds to carry out such warrantees, and I declare that the name of either with the seal of
104 either to such deeds shall bind my heirs, executors and administrators. It is also the case that I hold lands in common with Daniel Saffarrans. It is important that these lands be sold as purchasers may offer. My undivided half interest has already by this my will *will* been devised to my general trustees. I declare that they or either of them shall have the power to convey with warrantee. This power I presume they have by the first clause of my will, which vests the title in them. I only mention it here for greater certainty.

Item. If my brother, Peter, desires to keep up a household in this place I bequeath to him the use of my house, out houses, stables, lots, household furniture, books, horses, carriages and whatever belongs to the household establishment and also all my slaves or such of them as he may desire to have. I do not require that any inventory or appraisement of them be made, but on the breaking up of such household, he shall make out an inventory of such as remain unconsumed by use, and my other two trustees shall indorse an acceptance thereof after which time the property in such inventory shall go into the general trust and *and* be subject to all the regulations therein laid down.

Item. I give to my niece, Caroline, daughter of my brother William, one thousand dollars, payable after my debts are satisfied. I direct my executors to pay her sixty dollars per annum as interest thereon from the time of my death until paid.

Item. I give to my niece Rucellea, daughter of my brother Robert, two thousand dollars, payable after my debts are satisfied and I direct my executors to pay her one hundred dollars as interest thereon from my death until paid.

I have directed that a portion of my property shall be placed in the hands of my sons on their arriving at twenty-one, and I have directed that my trustees shall have the power to procure extension of my debts, and I have made the payment to my sons dependent on the payment of my debts. Now on reconsideration

it occurs to me that it may so happen that there will be out-standing and unadjusted accounts at the time my sons arrive at twenty-one, and yet it might be in no wise injurious or improper to place my sons in possession of a part of what may be coming to them. My trustees are therefore authorized, if they think fit, to let them have a portion of what is coming to them at twenty-one, even though some debts may remain unpaid. The amount of such portion shall be according to the discretion of my trustees. It shall not exceed the amount that is limited to them on the payment of debts, nor ought it to be an amount that would jeopardize their payment.

Remark. If the payment of the interest on the legacies jeojardize the payment of debts, the payment of such interest must cease without prejudice however to the right of the legatees to have the interest at the time they may be entitled to the principal. I further say that if the bequests to my brother Peter of the use of my household and slaves be found inconveniently to impair the capacity of the executors or trustees to pay debts, the use shall cease and no rights shall arise to him by such lapse or ceasing of the bequest.

I give to my son William my diamond ring. I give to my son James the watch which my son William wears, which belonged to his mother.

I appoint my brother Peter to be guardian of my sons and I direct that no security be required of him.

I appoint my brother Peter and Walter Goodman and Peter W. Lucas to be the executors of this my will and directed that no security be required of either of them.

In testimony that this is my will I have hereto affixed my seal and have subscribed my name and written my name in the margin this 28th day of February, 1846.

HENRY ANDERSON. [SEAL.]

We the undersigned attest that Henry Anderson signed and sealed this instrument in our presence and declared it to be his last will and we have subscribed the same in his presence and in the presence of each other.

Z. M. PHELPS,
H. M. LUSHER,
ISAAC SAFFARANS.

"EXHIBIT C."

This indenture made the first day of October, in the year of our Lord one thousand eight hundred and fifty-five, between Peter Anderson and Walter Goodman, both of Holly Springs, in the state of Mississippi, trustees and executors under the last will and testament of Henry Anderson, late of Holly Springs, in said state, deceased, of the first part, and Charles Butler of the city of New York, in the state of New York, of the second part, witnesseth, that the said parties of the first part, by virtue of the power and

authority to them given in and by the said last will and testament and for and in consideration of the sum of one dollar (and other considerations) lawful money of the United States of America, to them in hand paid, at or before the ensealing and delivery of these presents, by the said party of the second part, the receipt
106 whereof is hereby acknowledged, and the said party of the second part, his heirs and assigns forever released and discharged from the same by these presents, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, his assigns forever, all those certain lots or parcels of land situate, lying and being in the Vistula Division of the city of Toledo, county of Lucas, state of Ohio, known and designated as lots numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand eight (1,008), one thousand and nine (1,009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000), one thousand and one (1,001), said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street, also Water lot number nine hundred and ninety-two (992) extending from Water street to the line of wharfing and fronting on the Miami river one hundred and seventy-six feet and sixty-five hundredths of a foot, also town lots in the Port Lawrence division of said city of Toledo, numbered one hundred and eighty-five (185), one hundred and seventy-six (176), one hundred and eighty-eight (188), two hundred and ninety-eight (298), one hundred and fifty-seven (157), forty-eight (48), two hundred and forty-six (246), two hundred and sixty-two (262), two hundred and eighty-six (286), three hundred and four (304), three hundred and thirty-two (332), three hundred and thirty-three (333), three hundred and thirty-six (336), three hundred and thirty-seven (337), and three hundred and thirty-eight (338), as the same were laid out and numbered on the recorded map of said city, being the same premises conveyed by Edson Allen, master commissioner in chancery, to Henry Anderson, by deed dated the eighteenth of November, one thousand eight hundred and forty-four.

Together will all and singular the edifices, buildings, rights, members, privileges, advantages, hereditaments and appurtenances to the same belonging, or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, claim and demand whatsoever, both in law and equity, which the said testator had in his lifetime, and at the time of his decease, and which the said parties of the first part, or either of them, have or hath, by virtue of the said last will and testament, or otherwise, of, in, and to the same, and every part and parcel thereof, with the appurtenances; to have and to hold the said premises above
107 mentioned and described, and hereby granted and conveyed, or intended so to be, with the appurtenances, under the said

party of the second part, his heirs and assigns to his and their only proper use, benefit and behoof forever. It being understood that the above described premises were conveyed to Henry Anderson in fee but held by him in his life time as a mortgage to secure the payment of a certain sum of money due from Charles Butler to Henry Anderson which fact, after his death was duly acknowledged under seal of William Anderson and James H. Anderson his only heirs at law; said parties of the first part covenant, grant, promise and agree to and with the said party of the second part, his heirs and assigns, that the said party of the second part, his heirs and assigns, shall and lawfully may from time to time, and at all times forever hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy, all and singular the said hereditaments and premises hereby granted and conveyed, or intended so to be, with their and every of their appurtenances and receive and take the rents, issues and profits thereof, to and for his and their own use and benefit, without any lawful let, suit, hindrance, molestation, interruption or denial whatsoever, of, from, or by them the said parties of the first part, or their assigns; or, of, from or by any other person or persons whomsoever lawfully claiming, or who shall or may lawfully claim hereafter, by, from, or under them or either of them, or by, from, or under their heirs or assigns, any right, title, interest or estate; and that free and clear, and freely and clearly discharged, acquitted and exonerated, or otherwise well and sufficiently saved, defended, kept harmless and indemnified by them the said parties of the first part, their heirs and assigns, of, from, and against all and all manner of former and other gifts, grants, bargains, sales, mortgages, judgments and all other charges and incumbrances whatsoever, had, made, committed, executed or done by them the said parties of the first part, or by, through, or with their acts, deeds, means, consent, procurement or privity.

In witness whereof, the said parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

P. ANDERSON, [SEAL.]
W. GOODMAN, [SEAL.]
Executors and Trustees Under the Will of H. Anderson, Deceased.

108

Sealed and delivered in the presence of:

FINLEY I. WRIGHT.
S. H. FLEETWOOD.

STATE OF NEW YORK,
City and County of New York, ss:

On this ninth day of October, eighteen hundred and fifty-five before me, a commissioner for said state, appointed by the governor of the state of Ohio, to take acknowledgments of deeds to be recorded in said state of Ohio, personally came Peter Anderson and Walter Goodman to me known to be the grantors described in and who

executed the within deed and severally acknowledged the signing and sealing of said deed as their voluntary act.

In witness whereof I have hereunto subscribed my name and affixed my official seal.

[SEAL.] STANLEY H. FLEETWOOD.
Commissioner.

(Endorsed:) Peter Anderson and Walter Goodman, trustees and executors of Henry Anderson, deceased, to Charles Butler. Dated 1st of October, 1855. Deed lots in Toledo. Recorder's office, Lucas county, received for record May 2, 1860, and recorded May 2, 1860, in volume 34 of deeds, pages 110, 111 and 112. Johnathan Wynn, Recorder. Fees $1.35.

"EXHIBIT D."

This indenture made the sixteenth day of April, in the year of our Lord, one thousand eight hundred and sixty, between Peter W. Lacas of Holly Springs, in the state of Mississippi, one of the trustees and executors under the last will and testament of Henry Anderson, late of Holly Springs, deceased, of the first part, and Charles Butler, of the city of New York, of the second part, witnesseth that the said party of the first part, by virtue of the power and authority to him given in and by the said last will and testament, and for and in consideration of the sum of one dollar (and other considerations) lawful money of the United States of America, to him in hand paid, at or before the ensealing and delivery of these presents by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs and assigns forever released and discharged from the same by these presents, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, his heirs and assigns, forever, all those certain lots or parcels
109 of land situate, lying and being in the Vistula division of the city of Toledo, county of Lucas, state of Ohio, known and designated as lots numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1,008), one thousand and nine (1,009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000), one thousand and one (1,001), said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street, also water lot number nine hundred and ninety-two (992), extending from Water street to the line of wharfing and fronting on the Miami river one hundred and seventy-six feet and sixty-five hundredths of a foot. Also town lots in the Port Lawrence division of the said city of Toledo, numbered one hundred and eighty-five (185), one hundred and seventy-six (176), one hundred and eighty-eight (188), two hundred and ninety-eight (298), one hundred and fifty-seven (157), forty-eight (48), two hundred and forty-six (246), two hundred

and sixty-two (262), two hundred and eighty-six (286), three hundred and four (304), three hundred and thirty-two (332), three hundred and thirty-three (333), three hundred and thirty-six, three hundred and thirty-seven (337), three hundred and thirty-eight (338), as the same were laid out and numbered on the recorded map of said city being the same premises conveyed by Edson Allen, master commissioner in chancery to Henry Anderson by deed dated the eighteenth of November, one thousand eight hundred and forty-four.

Together with all and singular the edifices, buildings, rights, members, privileges, advantages, hereditaments and appurtenances to the same belonging, or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, claim and demand whatsoever, both in law and equity, which the said testator had in his lifetime, and at the time of his decease and which the said party of the first part, has or hath, by virtue of the said last will and testament, or otherwise, of, in, and to the same, and every part and parcel thereof, with the appurtenances; to have and to hold the said premises above mentioned and described, and hereby granted and conveyed or intended so to be, with the appurtenances, *under* the said party of the second part, his heirs and assigns, to his — their only proper use, benefit and behoof forever. It being understood that the above described premises were conveyed to Henry Anderson in fee but held by him in his lifetime as a mort-
110 gage to secure the payment of a certain sum of money due from Charles Butler to Henry Anderson, which fact, after his death was duly acknowledged under seal by William Anderson and James H. Anderson, his only heirs at law; said party of the first part covenant, grant, promise and agree to and with the said party of the second part, his heirs and assigns, that said party of the second part, his heirs and assigns, shall and lawfully may from time to time, and at all times forever hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy, all and singular the said hereditaments and premises hereby granted and conveyed or intended so to be with their and every of their appurtenances, and receive and take the rents, issues and profits thereof, to and for his and their own use and benefit, without any lawful let, suit, hindrance, molestation, interruption or denial whatsoever, of, from or by him the said party of the first part, or his assigns; or, of, from, or by any other person or persons, whomsoever lawfully claiming; or who shall or may lawfully claim hereafter, by, from, or under him, or by, from, or under right, title, interest or estate, and that free and clear, and freely and clearly discharged, acquitted and exonerated, or otherwise well and sufficiently saved, defended, kept harmless and indemnified by him the said party of the first part, his heirs and assigns of, from and against all and all manner of former and other gifts, grants, bargains, sales, mortgages, judgments, and all other charges and incumbrances whatsoever had made, committed, executed or done by him the said party of the first part, or by, through or with his acts, deeds, means, consent,

procurement or privity. The premises herein conveyed being the same also described and conveyed in a deed executed by Walter Goodman and Peter Anderson, two of the executors and trustees under the will of Henry Anderson, deceased, dated first of October, 1855, to Charles Butler, party of second part, and this deed being executed by said Lucas to remove doubts in respect to the title to the premises described and conveyed as aforesaid.

In witness whereof, the said party to these presents has hereunto interchangeably set his hand and seal the day and year first above written.

[SEAL.] P. W. LUCAS,
Executor of H. Anderson, Deceased.

Sealed and delivered in the presence of:
WM. M. SINCKLAND.
J. D. M. LITCHFIELD.

THE STATE OF MISSISSIPPI,
Marshall County, ss:

111 Personally appeared before me, A. W. Goodrich, an acting justice of the peace in and for said county, the within named P. W. Lucas who acknowledged that he signed, sealed and delivered the within deed on the day and year therein mentioned as his act and deed. In testimony whereof, I have hereunto set my hand and affixed the notarial seal of said county this 17th day of April, 1860.

A. W. GOODRICH,
[SEAL.] *Justice of Peace and ex-Officio Notary Public.*

(Endorsed:) Peter W. Lucas, trustee, etc., to Charles Butler. Dated ——— —, 185-. Deed. Recorder's office, Lucas county, Ohio, received for record May 2, 1860, and recorded May 3, 1860, in volume 34 of deeds pages 112, 113 and 114. Jonathan Wynn, Recorder. Fees $1.40.

"EXHIBIT G."

This indenture, made the seventh day of April, in the year one thousand eight hundred and sixty, between James H. Anderson of Austin, Tunica county, in the state of Mississippi (late of Holly Springs in said state) and Lida G., his wife, of the first part, and Charles Butler of the city of New York, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar (and other considerations) lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released and quit-claimed, and by these presents do remise, release and quit-claim, unto the said party of the second part, and to his heirs and assigns, forever, all those certain lots or parcels of land situate, lying and being in the Vistula division of the city of Toledo, county of Lucas, state of Ohio, known and designated as lots

numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1,008), one thousand and nine (1,009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000), one thousand and one (1,001), said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street, also Water lot number nine hundred and ninety-two (992), extending from Water street to the line of wharfing and fronting on the Miami river one hundred and seventy-six feet and sixty-five hundredths of a foot. Also town lots in the Port
112 Lawrence division of said city of Toledo, numbered one hundred and eighty-five (185), one hundred and seventy-six (176), one hundred and eighty-eight (188), two hundred and ninety-eight (298), one hundred and fifty-seven (157), forty-eight (48), two hundred and forty-six (246), two hundred and sixty-two (262), two hundred and eighty-six (286), three hundred and four (304), three hundred and thirty-two (332), three hundred and thirty-three (333), three hundred and thirty-six (336), three hundred and thirty-seven (337) and three hundred and thirty-eight (338), as the same were laid out and numbered on the recorded map of said city; being the same premi-es conveyed by Edson Allen, master commissioner in chancery to Henry Anderson by deed dated the eighteenth of November, one thousand eight hundred and forty-four. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, dower, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or, to, the above described premises, and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, his heirs and assigns, forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JAMES H. ANDERSON. [L. S.]
LIDA G. ANDERSON. [L. S.]

Sealed and delivered in the presence of:

W. GOODMAN.
B. W. WATTHALL.

Printed word "fifty" erased word "sixty" inserted.

THE STATE OF MISSISSIPPI.
Marshall County, ss:

Personally appeared before me, W. A. Goodrich, an acting justice of the peace and ex-officio notary public in and for said county, the within named James H. Anderson and Lida G. Anderson, his wife, who severally acknowledged that they signed, sealed and delivered the within deed on the day and year therein mentioned as their act

and deed, the said Lida G. Anderson on a private examination separate and apart from her said husband acknowledged that she
113 signed, sealed and delivered said deed as her voluntary act and deed freely without any fear, threats or compulsion of her said husband.

In testimony whereof I have hereunto set my hand and affixed the notarial seal this 16th day of April, A. D., 1860.

A. W. GOODRICH,

[SEAL.] *Justice of Peace and ex-Officio Notary Public.*

(Endorsed:) James H. Anderson and wife to Charles Butler, dated 7th day of April, 1860, quit-claim deed. Recorder's office, Lucas county, received for record May 2, 1860, and recorded May 3, 1860, in volume 34 of deeds pages 114 and 115. Jonathan Wynn, Recorder. Fees 90 cents.

"EXHIBIT H."

This indenture, made the twenty-second day of February, in the year one thousand eight hundred and forty-three, between Sidney Bissell, Edward Bissell and Jane A. M., his wife, of the city of Toledo, Lucas county, Ohio, of the first part, and Charles Butler, of the city of New York, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, remised, released and by these presents do grant, bargain, sell, remise, release and forever quit-claim, unto the said party of the second part and to his heirs and assigns forever, all those certain pieces, parcels, or lots of land situate, lying and being in the city of Toledo, in the county of Lucas and state of Ohio, and described as follows, to-wit: Town lots numbered eighteen (18), nineteen (19), twenty (20), twenty-one (21), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000), one thousand and one (1,001), one thousand and eight (1,008), one thousand and nine (1,009), nine hundred and ninety-two (992) in the Vistula division of the city of Toledo, as the same are laid out and numbered on the map or plat of said city made by Robert Gower, surveyor, and now recorded or on file in the office of the recorder of deeds for said county; also town lots numbers forty-eight (48), one hundred and fifty-seven (157), one hundred and eighty-five (185), two hundred and forty-six (246), one hundred and eighty-eight (188), two hundred and sixty-two (262), two hundred and eighty-six (286), two hundred and ninety-eight (298), three hundred and four (304), three hundred and thirty-two
114 (332), three hundred and thirty-three (333), three hundred and thirty-six (336), three hundred and thirty-seven (337), three hundred and thirty-eight (338), and ninety-seven (97), and ninety-eight (98), the two last named lots running from Summit street to the front line of wharfing as established by the proprietors of the Port Lawrence division of Toledo. The said last mentioned

lots from and including lot number forty-eight to and including lot number ninety-eight as the same are contained in the above description are all situate in said port Lawrence division of said city and laid out, numbered and designated on the said map before named.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest or demand whatsoever, of the said parties of the first part, either in law or equity, of, in and to the above bargained premises, with the said hereditaments and appurtenances. To have and to hold the said lots and premises to the said party of the second part and to his heirs and assigns, to the sole and proper use, benefit and behoof of the said party of the second part, his heirs and assigns, forever.

In witness whereof, the said parties of the first part, have hereunto set their hands and seals the day and year first above written.

SIDNEY BISSELL. [L. S.]
EDWARD BISSELL. [L. S.]
JANE A. M. BISSELL. [L. S.]

Signed, sealed and delivered in the presence of:

FREDERICK BISSELL.
JUNIUS FLAGG.

In the fifteenth line the words and figures following were interlined before signing, to-wit: "two hundred and ninety-eight (298)."

THE STATE OF OHIO.
Lucas County, ss:

On the 13th day of March, A. D., 1843, personally came before me, the subscriber, the within named Sidney Bissell, Edward Bissell, and Jane A. M. Bissell, the wife of the said Edward Bissell, and acknowledged the execution of the within deed to be their free act and deed for the uses and purposes therein mentioned. And the said Jane A. M., being by me examined separate and apart from her said husband, and the contents of said deed made known and explained to her, acknowledged that she executed the same without any fear or coercion of her said husband and that she is still satisfied therewith.

115 Witness my hand and notarial seal the day and year last above written.

[SEAL.] JUNIUS FLAGG.
Notary Public, Lucas County, Ohio.

(Endorsed:) Edward Bissell, Jane A. M., his wife, and Sidney Bissell to Charles Butler. Deed 992, transferred October 13, 1849. W. F. Dewey, auditor, recorder's office, Lucas county, Ohio. Received for record, October 11, 1849, recorded October 13, 1849, volume 16 deeds, pages 446 and 447. Henry Thatcher, Recorder.

"EXHIBIT I."

This agreement between Charles Butler of the one part and Henry Anderson of the other part, witnesseth:

Whereas the trustees of the American Land Company did by contract with the said Henry bind themselves to pay to the said Henry as compensation for the risk of executing warrantees for lands, the sum of five per cent on Indian reservations and two and one-half per cent for all other lands held by said company and purchased by the said Henry as one of the agents of said company which will appear, reference being had to a contract dated 10th August, 1840.

And whereas the said trustees have by resolution or agreement bound themselves to Charles Butler to compensate him for like risks in like manner for all the lands belonging to said company, and have resolved that warrantees made by the said Henry shall be considered as a part performance by the said Charles under said resolution.

Now the said Henry agrees that the said Charles shall have one-half of the commissions agreed to be paid to the said Henry for such risk to be computed on all lands sold, and to be sold, after the said 10th of August, 1840, on condition that the said Charles join with the said Henry in the said warrantees, taking one-half of the risks. And it is agreed that he shall in all things participate with the said Henry equally in his aforesaid contract with the trustees so far set forth as sales thereafter to be made are therein provided for. And the said Charles agrees with the said Henry that he shall have one-half of the commissions agreed by resolution of the trustees to be paid to the said Charles for his risk as aforesaid to be computed on all lands sold or to be sold in the states of Mississippi and Arkansas on condition that the said Henry join with the said Charles in said warrantees taking one-half of the risk. And it is agreed that he shall in all things participate with the said Charles equally in all the ben-
116 efits secured by him by the resolution or agreement of the trustees aforesaid so far forth as the lands aforesaid are concerned.

And it is mutually agreed that the commissions arising from the warrantees shall be set apart for the mutual indemnity of the parties to this contract for losses that may arise on said warrantees the same shall be invested from time to time as conveniently may be, on interest, and the interest shall be reinvested for the space of fifteen years and at the expiration of that time the same may be divided, but either party requiring it, shall be entitled to good and sufficient security to the amount of the sum divided and withdrawn by the other, to meet any loss on the warrantees that may arise to the amount so withdrawn.

And it is agreed that the said Henry shall invest the said commissions and he shall render yearly accounts to the said Charles of the sums arising from commissions and the mode of investment and the securities taken; and touching said securities he shall not be responsible to the said Charles for the goodness thereof but as to the time of investment he shall be bound to invest so soon as five hundred

dollars shall arise or he shall be chargeable with interest thereon at the rate of 8 per cent per annum. And in case of the death of the said Henry his representatives shall invest as aforesaid. And it is agreed that if the contract of the said Henry with the trustees or the resolution of the trustees with the said Charles be rescinded or impaired, the consideration of this contract shall not be deemed to have failed.

Now in consideration of the foregoing agreement the said Charles hath and doth hereby bind himself to the said Henry to perform all and singular the stipulations on his part to be done and performed and the said Henry hath and doth hereby bind himself to the said Charles to do and perform all and singular the stipulations on his part to be done and performed according to the true intent and meaning of said agreement.

Done and executed this twenty-first day of September in the year A. D., 1841.

[SEAL.] CHARLES BUTLER.
[SEAL.] HENRY ANDERSON.

"EXHIBIT J."

Referred to in and made a part of the foregoing stipulation.

List of Written Instruments, Books, Documents, Statements, Letters, Press Copies of Letters, and Statements and All Other In-
117 *struments Delivered to Oliver B. Snider, Esq., of Toledo, Ohio, by Willard Parker Butler, Esq., of New York City, New York, on the first day of June,* 1905.

1. Letter book marked "C. Butler's letters June 1847 to April, 1849."

2. Letter book marked "Business letters from May 1849, to January, 1852, Charles Butler."

3. Letter book marked "Letters, Charles Butler, January, 1857, to August, 1860."

4. Letters marked "C. Butler's letters, August, 1860, to August, 1867."

5. Letter file marked "Letters received, January, 1849, to December, 1849."

6. Letter file marked "Letters received, January, 1850, to October, 1851."

7. Letter file marked "Letters, Mississippi, from —— to ——." The first letter being dated March 27, 1857.

8. Letter file marked on back "Letters received, Mississippi, from —— to ——." The first letter being dated April 21, 1851.

9. Bundle of miscellaneous letters from Peter Anderson, Henry Anderson, Walter Goodman, John Fitch, and Morrison R. Waite and Charles Butler.

10. Envelope containing receipts of Walter Goodman, executor, Peter Anderson, executor, statement of account dated September

27, 1852; original note for $87,430.10 dated October 1, 1853; draft for $2,172.70, drawn by James H. Anderson at Memphis, Tennessee, March 8, 1861, on Charles Butler, No. 12 Wall Street, New York, and stamped, "Received payment, American Exchange National Bank."

11. Bundle containing original papers, Exhibits B to G, inclusive, mentioned in stipulation, bearing like date herewith; also certified copy of deed of Edson Allen, master, to Henry Anderson, dated 18th day of November, 1844.

12. Release Henry Anderson to Edward Bissell.

Exhibit No. 2.

Edson Allen, Master Commissioner in Chancery—Deed to Henry Anderson.

This indenture, made the eighteenth day of November in the year of our Lord one thousand eight hundred and forty-four, by and between Edson Allen, one of the master commissioners in chancery within and for the county of Lucas and state of Ohio, of the first part, and Henry Anderson of Holly Springs in the state of Mississippi, of the second part, witnesseth: That, whereas, heretofore, to-wit, at the April term of the court of Common Pleas within and for said
118 county in chancery sitting in the year of our Lord one thousand eight hundred and forty-four, it was ordered, adjudged and decreed by said court in a certain cause therein pending wherein the said Henry Anderson was complainant and Edward Bissell, Jane A. M. Bissell, his wife, Sidney Bissell and Charles Butler, were respondents, that the said cause be referred to the said party of the first part then and still being master commissioner in chancery as aforesaid to take and state an account between the said parties of and concerning the matters and things in controversy in the said suit and also that he cause to be appraised and that he sell according to law the several lots of land and premises described in the complainant's bill, to-wit: town lots in the Vistula division of the city of Toledo, in the county of Lucas and state of Ohio, and known and designated as lots numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1008), one thousand and nine (1009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1000), one thousand and one (1001), said *blocks* being in one block, bounded northerly by Summit street, southerly by Water street, easterly by Cherry street, and westerly by Lynn street. Also Water lot number nine hundred and ninety-two (992) extending from Water street to the line of wharfing and fronting on the Miami river one hundred and seventy-six feet and sixty-five hundredths of a foot. Also town lots in the Port Lawrence division of said city of Toledo, numbered one hundred and eighty-five (185), one hundred and seventy-six (176), one hundred and eighty-eight (188), two hundred and ninety-eight (298), one hundred and fifty-seven (157), forty-eight (48), two hundred and forty-six (246), two hundred and sixty-two (262), two hundred

and eighty-six (286), three hundred and four (304), three hundred and thirty-two (332), three hundred and thirty-three (333), three hundred and thirty-six (336), three hundred and thirty-seven (337), and three hundred and thirty-eight (338), as the same are laid out and numbered on the recorded map of said city, and *and* that he bring the proceedings of said sale into said court at the next ensuing term thereafter then and there to abide the order of the court in the premises. And whereas on the fourth day of May in the year of our Lord one thousand eight hundred and forty-four an order was issued out of and under the seal of the said court directed and delivered to the said party of the first part then and still being such master commission- in chancery as aforesaid directing and commanding him to execute and carry out the provisions of said
119 before-mentioned decree. And the said party of the first part in pursuance thereof summoned the solicitor of the said complainant and the said Edward Bissell before him to make proof of the matters and things charged in the complainant's said bill of complaint and to him referred as aforesaid and upon hearing the allegations and proofs of the said parties he found to be due from the said Edward Bissell to the said complainant upon the bond and mortgage set forth in said bill the sum of twenty-nine thousand one hundred and thirty-nine dollars and one cent which fact the said party of the first part reported to the said court at the next succeeding June term thereafter together with the fact that the said lands and tenements had not been appraised and sold by the said party of the first part as was further ordered and directed in and by the said decree hereinbefore mentioned. Whereupon the said court then and there ratified and confirmed said report and further ordered and directed the said party of the first part then and still being said master commissioner in chancery as aforesaid should proceed to cause the several lots of land and premises hereinbefore described to be appraised according to law and make sale thereof as directed in said first mentioned decree, and bring the proceeds of such sale into the said court at the next ensuing term thereof. And whereas on the tenth day of July in the year of our Lord one thousand eight hundred and forty-four a further order was issued out of and under the seal of the said court directed and delivered to the said party of the first part, master commissioner in chancery as aforesaid, commanding and directing him to execute and carry out fully the provision of said first mentioned decree, and the said party of the first part in pursuance of said decree and in obedience to the order and direction of the said court herein last above recited on the third day of August in the year of our Lord one thousand eight hundred and forty-four, by the oaths of Rosewell Cheney, Lyman Wheeler, and Ezra B. Dodd, three judicious disinterested freeholders of the said county of Lucas, proceeded to have appraised according to law the said lands and premises hereinbefore described (a copy of which appraisement the said party of the first part forthwith returned to and filed in the office of the clerk of said court), and having given at least thirty days' previous notice of the time and place of sale by advertisement in the Toledo Gazette, a newspaper printed and published in said county of Lucas and in

general circulation therein, on the twenty-fourth day of September in the year of our Lord one thousand eight hundred and forty-four at the door of the courthouse in said county sold the said several lots of land and premises to the said party of the second part at and for the sum of six thousand nine hundred and twenty-one dollars being the aggregate amount of the several sums bid upon said lots as they were severally offered for sale and being the highest and best bids therefor and more than two-thirds of the appraised value of each lot and parcel of land so sold as aforesaid. And whereas the said party of the first part at the October term of said court in the year of our Lord one thousand eight hundred and forty-four, reported said sale to said court who, thereupon, then and there, ratified and confirmed the same and directed the said party of the first part to execute and deliver to the said party of the second part a deed of conveyance in fee simple for the several lots and parcels of land so by him sold as aforesaid. Now, therefore, be it known that the said party of the first part in pursuance of said decree and of the order and direction of said court and in consideration of the premises and of the said sum of six thousand nine hundred and twenty-one dollars to him in hand paid, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, the said several lots of land and premises hereinbefore mentioned and described as follows, to-wit: town lots in the Vistula division of the city of Toledo in the county of Lucas and state of Ohio, numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1008), one thousand and nine (1009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1000), one thousand and one (1001), said lots being in one block, bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street. Also Water lot number nine hundred and ninety-two (992), extending from Water street to the line of wharfing and fronting on the Miami river one hundred and seventy-six feet and sixty-five hundredths of a foot. Also the following tracts, parcels or lots of land situate in the Port Lawrence division of the city of Toledo in said county numbered one hundred and eight-five (185), one hundred and seventy-six (176), one hundred and eight-eight (188), two hundred and ninety-eight (298), one hundred and fifty-seven (157), forty-eight (48), two hundred and forty-six (246), two hundred and sixty-two (262), two hundred and eighty-six (286), three hundred and four (304), three hundred and thirty-two (332), three hundred and sixty-three (363), three hundred and
121 thirty-six (336), three hundred and thirty-seven (337), three hundred and thirty-eight (338), as the same are laid out and numbered on the recorded map of said city. To have and to hold the same with all and singular the appurtenances thereunto belonging unto the said party of the second part, his heirs and assigns forever.

396

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

EDSON ALLEN,
Master Commissioner in Chancery. [L. S.]

Signed, sealed and delivered in presence:

JOHN FITCH.
C. M. DORR.

In the twelfth line of the first page the words "referred to" were interlined before signing.

THE STATE OF OHIO,
Lucas County, ss:

This day personally came before me Edson Allen, master commissioner in chancery within and for the said county of Lucas and acknowledged that he executed this deed for the uses and purposes therein expressed as such master commissioner in chancery. As witness my hand and seal of office this the 24th day of December, A. D. 1844.

C. M. DORR.
[L. S.] *Notary Public, Lucas County, Ohio.*

Transferred December 27, 1844. Uriel Spencer, county auditor.
Received for record December 27, 1844, and recorded January 16, 1845.

JUNIUS FLAGG, *Recorder.*

UNITED STATES OF AMERICA.
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed, recorded in volume 10, of the record of deeds of said Lucas county, at page 168, which said record of deeds is in the office of the county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 29th da y of April, A. D., 1905.

[SEAL.] THOS. H. BARKDULL,
County Recorder, Lucas County, Ohio.

122 EXHIBIT No. 3.

Sidney Bissell and Edward Bissell and Jane A. M. Bissell
to
Charles Butler.

Quit-claim Deed.

This indenture, made the twenty-second day of February in the year one thousand eight hundred and forty-three, between Sidney Bissell, Edward Bissell and Jane A. M., his wife, of the city of Toledo, Lucas county, Ohio, of the first part, and Charles Butler, of the city of New York, of the second part, witnesseth: That the said parties of the first part for and in consideration of the sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, remised, released, and by these presents do grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part, and to his heirs and assigns forever, all those certain pieces, parcels, or lots of land situate, lying and being in the city of Toledo, in the county of Lucas and state of Ohio; and described as follows, to-wit: town lots numbered eighteen (18), nineteen (19), twenty (20), twenty-one (21), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000), one thousand and one (1,001), one thousand and eight (1,008), one thousand and nine (1,009), and nine hundred and ninety-two (992), in the Vistula division of the city of Toledo, as the same are laid out and numbered on the map or plat of said city made by Robert Gower, surveyor, and now recorded or on file in the office of the recorder of deeds for said county. Also town lots numbered forty-eight (48), one hundred and fifty-seven (157), one hundred and eighty-five (185), two hundred and forty-six (246), one hundred and eighty-eight (188), two hundred and sixty-two (262), two hundred and eighty-six (286), two hundred and ninety-eight (298), three hundred and four (304), three hundred and thirty-two (332), three hundred and thirty-three (333), three hundred and thirty-six (336), three hundred and thirty-seven (337), three hundred and thirty-eight (338), and ninety-eight (98), the first two lots named running from Summit street to the front line of wharfing as established by the proprietors of the Port Lawrence division of Toledo, the said last mentioned lots from and including lot number forty-eight to and including lot number ninety-eight as the same are contained in the above description are all situated in said Port Lawrence division of the city of said Toledo and laid out and numbered and designated on the said map before named together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the
123 reversion and reversions, remainder and remainders, rents issued and profits thereof, and all the estate, right, title, interest or demand whatsoever of the said parties of the first part,

either in law or equity of, in and to the above bargained premises, with the said hereditaments and appurtenances, to have and to hold the said lots and premises to the said party of the second part and to his heirs and assigns, to the sole and proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

SIDNEY BISSELL. [L. S.]
EDWARD BISSELL. [L. S.]

Signed, sealed and delivered in the presence of:
FREDERICK BISSELL.
JUNIUS FLAGG.

In the fifteenth line the words and figures following were interlined before signing, to-wit, "two hundred and ninety-eight (298)."

THE STATE OF OHIO,
Lucas County, ss:

On this 13th day of March, A. D. 1843, personally came before me, the subscriber, the within named Sidney Bissell, Edward Bissell and Jane A. M. Bissell, the wife of the said Edward Bissell and acknowledged the execution of the within deed to be their free act and deed for the uses and purposes therein mentioned. And the said Jane A. M., being by me examined separate and apart from her said husband, and the contents of said deed made known to her and explained to her, acknowledged that she executed the same, without any fear or coercion of her said husband, and that she is still satisfied therewith. Witness my hand and notarial seal the day and year last above written.

[SEAL.]

JUNIUS FLAGG,
Notary Public, Lucas County, Ohio.

Transferred October 13, 1849.

W. F. DEWEY,
County Auditor.

Received for record October 11, 1849, and recorded October 13, 1849.

HORACE THATCHER, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed, recorded in volume 16, of the record of deeds of said Lucas county, at page 446, which said record of deeds is in the office of
124 county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D., 1905.

THOS. H. BARKDULL,
County Recorder of Lucas County Ohio.

EXHIBIT No. 4.

Peter Anderson and Walter Goodman, Trustees and Executors of Henry Anderson, Deceased,
to
Charles Butler.

Deed.

This indenture, made this first day of October in the year of our Lord one thousand eight hundred and fifty-five, between Peter Anderson and Walter Goodman, both of Holly Springs in the state of Mississippi, trustees and executors under the last will and testament of Henry Anderson, late of Holly Springs, in said state, deceased, of the first part, and Charles Butler of the city of New York in the state of New York, of the second part, witnesseth: that the said parties of the first part by virtue of the power and authority to them given in and by the said last will and testament and for and in consideration of the sum of one dollar and other considerations lawful money of the United States of America, to them in hand paid at or before the ensealing and delivery of these presents by the said party of the second part the receipt whereof is hereby acknowledged and the said party of the second part, his heirs and assigns forever, released and discharged from the same by these presents have granted, bargained, sold, and aliened, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, his heirs and assigns, forever, all those certain lots or parcels of land situate, lying and being in the Vistula division of the city of Toledo, county of Lucas, state of Ohio, known and designated as lots numbered eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1,008), one thousand and nine (1,009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000), one thousand and one (1,001), said lots being in one block, bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street also water lot number nine hundred and ninety-two (992), extending from Water street to the line of wharfing and fronting on the Miami river, one hundred and seventy-six and sixty-five hundredths of a foot; also town lots in
125 Port Lawrence division of said city of Toledo, numbered one hundred and eighty-five (185), one hundred and seventy-six (176), one hundred and eighty-eight (188), two hundred and ninety-eight (298), one hundred and fifty-seven (157), forty-eight

(48), two hundred and forty-six (246), two hundred and sixty-two (262), two hundred and eighty-six (286), three hundred and four (304), three hundred and thirty two (332), three hundred and thirty-three (333), three hundred and thirty-six (336), three hundred and thirty-seven (337), and three hundred and thirty-eight (338), as the same were laid out and numbered on the recorded map of said city, being the same premises conveyed by Edson Allen, master commissioner in chancery to Henry Anderson, by deed dated the eighteenth November, one thousand eight hundred and forty-four. Together with all and singular the edifices, buildings, rights, members, privileges, advantages, hereditaments and appurtenances to the same belonging or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also the estate, right, title, interest, claim and demand whatsoever both in law and equity which the said testator had in his lifetime and at the time of his decease and which the said parties of the first part or either of them have or hath by virtue of the said last will and testament or otherwise of, in and to the same and every part and parcel thereof with the appurtenances: to have and to hold the said premises above mentioned and described and hereby granted and conveyed or intended so to be with the appurtenances *unto* the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof forever. It being understood that the above described premises were conveyed to Henry Anderson in fee but held by him in his lifetime as mortgage to secure the payment of a certain sum of money due from Charles Butler to Henry Anderson, which fact after his death was duly acknowledged under seal by William Anderson and James H. Anderson, his only heirs at law; said party of the first part covenant and agree to and with the said party of the second part, his heirs and assigns, that the said party of the second part, his heirs and assigns, shall and lawfully may, from time to time, and at all times forever hereafter, peaceably and quietly have, hold, use, occupy possess and enjoy all and singular the said hereditaments and premises hereby granted and conveyed or intended so to be with their and every of their appurtenances and receive and take the rents, issues and profits thereof to and for his and their own
126 use and benefit without any lawful let, suit, hindrance, molestation, interruption or denial whatsoever of, from or by them, the said parties of the first part or their assigns or of, from or by any other person or persons whomsoever lawfully claiming or who shall or may lawfully claim hereafter by, from or under them, or either of them, or by, from or under their heirs or assigns, any right, title, interest or estate and that free and clear and freely and clearly discharged, acquitted and exonerated or otherwise well and sufficiently saved, defended, kept harmless and indemnified by them the said parties of the first part, their heirs and assigns, of, from and against all and all manner of former or other gifts, grants, bargains, sales, mortgages, judgments and all other charges and incumbrances whatsoever had, made, committed, executed or

done by them, the said parties of the first part or by, through or with their acts, means, consent, procurement or privity.

In witness whereof the said parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

[SEAL.] P. ANDERSON,
Executor and Trustee, etc.

[SEAL.] W. GOODMAN,
Executor and Trustee under the Will of H. Anderson, Deceased.

Sealed and delivered in the presence of:

FINLEY I. WRIGHT.
S. H. FLEETWOOD.

STATE OF NEW YORK,
City and County of New York, ss:

On this ninth day of October eighteen hundred and fifty-five, before me, a commissioner for said state appointed by the governor of the state of Ohio to take acknowledgments of deeds to be recorded in said state of Ohio, personally came Peter Anderson and Walter Goodman to me known to be the grantors described in and who executed the within deed and severally acknowledged the signing and sealing of said deed as their voluntary act.

In witness whereof I have hereunto subscribed by name and affixed my official seal.

[SEAL.] STANLEY B. FLEETWOOD,
Commissioner.

Received for record May 2, 1860, and recorded same day.

JOHNATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to
127 be a true, perfect and complete copy of the record of a certain deed, recorded in volume 34, of the record of deeds of said Lucas county, at page 110, which said record of deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D., 1905.

[SEAL.] THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

Exhibit No. 5.

P. W. Lucas, Executor of H. Anderson, Deceased,
to
Charles Butler.

Deed.

This indenture, made this the sixteenth day of April, in the year of our Lord one thousand eight hundred and sixty, between Peter W. Lucas, of Holly Springs, in the state of Mississippi, one of the trustees and executors under the last will and testament of Henry Anderson, late of Holly Springs, deceased, of the first part and Charles Butler, of the city of New York, of the second part, witnesseth, that the said party of the first part, by virtue of the power and authority to him given in and by the said last will and testament and for and in consideration of one dollar (and other considerations) lawful money of the United States of America to him in hand paid at or before the ensealing and delivery of these presents by the said party of the second part, the receipt whereof is hereby acknowledged and the said party of the second part, his heirs and assigns, forever, released and discharged from the same by these presents have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, his heirs and assigns, forever: All those certain lots or parcels of land situate, lying and being in the Vistula division of the city of Toledo, county of Lucas, state of Ohio, known and designated as lots numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1,008), one thousand and nine (1,009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000), one thousand and one (1,001), the said lots being in one block, bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street. Also water lot number nine hundred and ninety-two (992), extending from Water street to the line of wharfing and fronting on the Miami river one
128 hundred and seventy-six feet and sixty-five hundredths of a foot. Also town lots in the Port Lawrence division of the said city of Toledo, numbered one hundred and eighty-five (185), one hundred and seventy-six (176), one hundred and eighty-eight (188), two hundred and ninety-eight (298), one hundred and fifty-seven (157), forty-eight (48), two hundred and forty-six (246), two hundred and sixty-two (262), two hundred and eighty-six (286), three hundred and four (304), three hundred and thirty-two (332), three hundred and thirty-three (333), three hundred and thirty-six (336), three hundred and thirty-seven (337), three hundred and thirty-eight (338), as the same were laid out and numbered on the recorded map of said city, being the same premises conveyed by Edson Allen, master commissioner in chancery to

Henry Anderson, by deed dated the eighteenth of November, one thousand eight hundred and forty-four. Together with all and singular the edifices, buildings, rights, members, privileges, advantages, hereditaments and appurtenances to the same belonging, or in any wise appertaining and the revision and revisions, remainder and remainders, rents, issues and profits thereof and also all the estate, right, title, interest, claim and demand whatsoever both in law and equity which the said testator had in his lifetime and at the time of his decease and which the said party of the first part has or hath by virtue of the said last will and testament or otherwise of, in and to the same and every part and parcel thereof with the appurtenances. To have and hold the said premises above mentioned and described and hereby granted and conveyed or intended so to be with the appurtenances under the said party of the second part, his heirs and assigns, to his, their only proper use, benefit and behoof forever. It being understood that the above described premises were conveyed to Henry Anderson in fee, but held by him in his lifetime as a mortgage to secure the payment of a certain sum of money due from Charles Butler to Henry Anderson, which fact, after his death, was duly acknowledged under seal by William Anderson and James H. Anderson, his only heirs at law, said parties of the first part covenant, grant, promise and agree to and with the said party of the second part, his heirs and assigns, that the said party of the second part, his heirs and assigns, shall and lawfuly may, from time to time, and at all times forever hereafter, peacably and quietly have, hold, use, occupy, possess and enjoy, all and singular, the said hereditaments and premises hereby granted and conveyed or intended so to be with their and every of their appurtenances and receive and take the rents, issues and profits thereof
129 to and for his and their own use and benefit without any lawful let, suit, hindrance, molestation, interruption or c[illegible]nial whatsoever of, from or by him, the said party of the first part, or his assigns, or of, from or by any other person or persons whomsoever lawfully claiming, or who shall or may lawfully claim hereafter, by, from or under him, or by, from or under right, title, interest or estate and that free and clear and freely and clearly discharged, acquitted and exonerated or otherwise well and sufficiently saved, defended, kept harmless and indemnified by him, the said party of the first part, his heirs and assigns, of, from and against all and all manner of former and other gifts, grants, bargains, sales, mortgages, judgments, and all other charges and incumbrances whatsoever, had, made, committed, executed or done by him, the said party of the first part, or by, through, or with his acts, deeds, means, procurement or privity. The premises hereby conveyed being the same also described and conveyed in a deed executed by Walter Goodman and Peter Anderson two of the executors and trustees under the will of Henry Anderson, deceased, dated first of October, 1855, to Charles Butler, party of the second part, and this deed being executed by said Lucas to remove doubts in respect to the title to the premises described and conveyed as aforesaid. In witness whereof the said party to these presents has hereunto inter-

changeably set his hand and seal the day and year first above written.

[SEAL.] P. LUCAS,
Executor of H. Anderson, Deceased.

Sealed and delivered in presence of—
WM. M. GRUISTLAND,
J. D. M. LITCHFIELD.

STATE OF MISSISSIPPI,
Marshall County:

Personally appeared before me, A. W. Goodrich, an acting justice of the peace in and for said county, the within named P. W. Lucas, who acknowledged that he signed, sealed and delivered the within deed on the day and year therein mentioned as his act and deed.

In testimony whereof I have hereunto set my hand and affixed the notarial seal of said county this 17th day of April, 1860.

A. W. GOODRICH. [L. S.],
J. P. and Ex-officio Notary Public.

Received for record May 2, 1860, and recorded May 3, 1860.
JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to
130 be a true, perfect and complete copy of the record of a certain deed, recorded in volume 34, of the record of deeds of said Lucas county, at page 112, which said record of deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D., 1905.

[SEAL.] THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

EXHIBIT No. 6.

James H. Anderson
to
Charles Butler.

Deed.

This indenture made the seventh day of April, in the year one thousand eight hundred and sixty, between James H. Anderson,

of Austin, Tunica county, in the state of Mississippi (late of Holly Springs, in said state) and Lida G., his wife, party of the first part, and Charles Butler, of the city of New York, of the second part, witnesseth, that the said party of the first part and in consideration of the sum of (one dollar and other considerations) lawful money of the United States of America to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged have remised, released and quit-claimed and by these presents do remise, release and quit-claim unto the said party of the second part and to his heirs and assigns forever, all those certain lots or parcels of land situate, lying and being in the Vistula division of the city of Toledo, county of Lucas, state of Ohio, known and designated as lots numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1,008), one thousand and nine (1,009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000), one thousand and one (1,001), said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street, and westerly by Lynn street. Also water lot numbered nine hundred and ninety-two (992), extending from Water street to the line of wharfing and fronting on the Miami river one hundred and seventy-six feet and sixty-five hundredths of a foot; also town lots in Port Lawrence division of said city of Toledo, number one hundred and eighty-five (185), one hundred and seventy-six (176), one hundred and eighty-eight (188), two hundred and ninety-eight (298), one hundred and fifty-seven (157), forty-eight (48), two hundred and forty-six (246), two hundred and sixty-two (262),
two hundred and eighty-six (286), three hundred and four
131 (304), three hundred and thirty-two (332), three hundred
and thirty-three (333), three hundred and thirty-six (336), three hundred and thirty-seven (337) and three hundred and thirty-eight (338), as the same were laid out and numbered on the recorded map of said city being the same premises conveyed by Edson Allen, master commissioner in chancery to Henry Anderson by deed dated the eighteenth of November, one thousand eight hundred and forty-four. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, issues, and profits thereof, and also the estate, right, title, interest, dower, property, possession, claim and demand whatsoever as well in law as in equity of the said parties of the first part, of, in or to the above described premises and every part and parcel thereof with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, his heirs and assigns forever.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

[SEAL.] JAMES H. ANDERSON.
[SEAL.] LIDA G. ANDERSON.

Sealed and delivered in the presence of—

W. GOODMAN,
B. W. WATTHALL.

Printed word "fifty," erased word "sixty" inserted.

THE STATE OF MISSISSIPPI,
Marshall County, ss:

Personally appeared before me, A. W. Goodrich, an acting justice of the peace and ex-officio notary public, in and for said county, the within named James H. Anderson and Lydia G. Anderson, his wife, who severally acknowledged that they signed, sealed and delivered the within deed on the day and year therein mentioned as their act and deed, and the said Lida G. Anderson on a private examination separate and apart from her said husband acknowledged that she signed, sealed and delivered said deed as her voluntary act and deed freely without and fear, threats or compulsion of her said husband.

In testimony whereof I have hereunto set my hand and affixed the notarial seal this 16th day of April, A. D., 1860.

[SEAL.] A. W. GOODRICH,
Justice of Peace and Ex-Officio Notary Public.

132 Received for record May 2, 1860, and recorded May 3, 1860.

JONATHAN WYNN,
Recorder.

UNITED STATES OF AMERICA,
State of Ohio, Lucas county, ss:

I, Thos. H. Barkdull, county recorder, of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed, recorded in volume 34, of the record of deeds of said Lucas county, at page 114, which said record of deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D., 1905.

[SEAL.] THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

EXHIBIT No. 7.

Charles Butler and wife
to
Calvin Bronson.

Deed.

Know all men by these presents, that I, Charles Butler, of the city, county and state of New York in consideration of the sum of seventeen thousand and five hundred dollars to me paid by Calvin Bronson of the city of Toledo, in the county of Lucas and state of Ohio, the receipt whereof is hereby acknowledged, do hereby bargain, sell and convey unto the said Calvin Bronson and his heirs and assigns forever, the following described real estate situate in county of Lucas, and state of Ohio, to-wit, lots Nos one thousand and eight (1,008), one thousand and nine (1,009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000), one thousand and one (1,001), eighteen (18), nineteen (19), twenty (20), and twenty-one (21), in the Vistula division of the city of Toledo, as numbered and designated on the Gower map (so-called) of said city on file in the recorder's office of Lucas county, Ohio, and being the entire block of land lying within the boundary of Summit, Cherry, Water and Lynn streets in said Vistula division of Toledo, saving, however, and excepting and reserving from the above described premises all rights which the Western Seaman's Friend Society have in and to sixty (60) feet front on Lynn street, being thirty feet each side of the Bethel church as said church now stands and extending back the same width to a point eighty feet from the northeasterly line of said Lynn street; the said Western Seaman's Friend Society now being in the occupation of said premises by virtue of an agreement on the part of me, the said Charles Butler, to donate the same to said society as a building site for a Bethel church to be used
133 and occupied by said society for Bethel church purposes and no other together with all the privileges and appurtenances to the same belonging. To have and to hold the same unto the said Calvin Bronson and his heirs and assigns forever, hereby covenanting that the title so conveyed is clear, free and unincumbered except by the claim of the Western Seaman's Friend Society as aforesaid and that I will warrant and defend the same against all claims whatsoever, except said claim of the Western Seaman's Friend Society, and claims for taxes and assessments levied or assessed on said premises since the twenty-six day of December, A. D., 1859. And I, Eliza A. Butler, wife of the said Charles Butler, in consideration of one dollar to me in hand paid do remise, release and forever quit-claim unto the said grantee all my right by way of dower or otherwise in and to the above granted tenements.

In witness whereof we, the said Charles Butler and Eliza A.

Butler, hereunto set our hands and seals this twenty-third day of April, in the year eighteen hundred and sixty.

[SEAL.] CHARLES BUTLER.
[SEAL.] ELIZA A. BUTLER.

Signed, sealed and delivered in presence of:

E. ANNIE BUTLER.
SAM T. BULL.

THE STATE OF NEW YORK,
New York City and County, ss:

On this twenty-third day of April, A. D., 1860, before me, the subscriber, a commissioner for the state of Ohio, duly commissioned and sworn, dwelling in the city of New York, personally appeared Charles Butler and Eliza A. Butler, the grantors in the above conveyance and acknowledged the same to be their voluntary act and deed for the uses and purposes therein mentioned. And the said Eliza A. Butler, wife of the said Charles Butler, being examined by me separate and apart from her said husband and the contents of said deed made known and explained to her, did declare that she did voluntarily sign, seal and acknowledge the same and that she was still satisfied therewith as her act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal on the day and year last aforesaid.

[SEAL.] SAM T. BULL,
Commissioner for the State of Ohio.

Transferred May 2, 1860.

ALEX. READ,
County Auditor.

Received for record May 2, 1860, and recorded May 3, 1860.
JONATHAN WYNN,
Recorder.

134 UNITED STATES OF AMERICA,
State of Ohio, Lucas county, ss:

I, Thos. H. Barkdull, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed, recorded in volume 34 of the record of deeds of said Lucas county, at page 116, which said record of deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D., 1905.

[SEAL.] THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

EXHIBIT No. 8.

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March, in the year one thousand and eight hundred and sixty, by and between Patrick J. Monahan, as clerk of the city of Toledo, county of Lucas, and in the state of Ohio, of the one part, and Charles Butler, of the city of New York, of the other part, witnesseth: That whereas the collector of said city on the twenty-eight of December in the year one thousand, eight hundred and forty, did sell according to the provisions of the charter and ordinances of said city in such case made and provided to John Fitch, the following described one-half of town lot situate in the city of Toledo, for the delinquent city taxes, interest and penalty, charged thereon to-wit: One-half of lot number nineteen (19), in the Vistula division of the city of Toledo, which said taxes, interest and penalty amounted to the sum of three 46-100 dollars and were forthwith paid by the purchaser to the said collector. And more than two years having elapsed from the time of said sale and the said property so sold not having been redeemed and the certificate of sale to the said John Fitch having been by him assigned and transferred to the said Charles Butler and having been produced to me with the endorsement of the city treasurer thereon, that no money had been deposited with him for the redemption thereof. Now, in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as clerk of the said city of Toledo, *doth* hereby grant and convey to the said Charles Butler, his heirs and assigns forever, the premises so sold as aforesaid. To have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever.

135 In witness whereof, the said Patrick J. Monahan, clerk of said city, has hereunto set his hand officially and the corporate seal of said city on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN, *City Clerk.*

Signed, sealed and delivered in presence of:

J. M. GLOYD.
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me, the subscriber, a notary public in and for said county, personally appeared Patrick J. Monahan, clerk of said city of Toledo, and as such acknowledged the within instrument to be his voluntary

and official act and deed for the purposes therein expressed, given under my hand and official seal this twenty-seventh day of March, A. D., 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas County, Ohio.

Received for record, April 2, 1860, and recorded same day.
JONATHAN WYNNE, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed, recorded in volume 34, of the record of deeds of said Lucas county, at page 4, which said record of deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D., 1905.

[SEAL.] THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

EXHIBIT No. 9.

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March, in the year one thousand, eight hundred and sixty, by and between Patrick J. Monahan, as clerk of the city of Toledo, county of Lucas, in the state of Ohio, of the one part, and Charles Butler, of the city of New York, of the other part, witnesseth: That whereas the treasurer of said city on the twenty-seventh of December, in the year one thousand, eight hundred and forty-seven, did sell according to the provisions of the charter and ordinances of said city in such case made and provided to Charles M. Dorr, the following described lot situate in the city of Toledo, for the Vistula grade tax-charged
136 thereon for the year 1847, to-wit: Town lot number nineteen (19), in the Vistula division of the city of Toledo, which said tax amounted to the sum of sixty-six 57-100 dollars and were forthwith paid by the purchaser to the city treasurer, and more than two years having elapsed from the time of said sale and the said premises so sold not having been redeemed and the certificate of sale to the said Charles M. Dorr, having been by him assigned and transferred to the said Charles Butler and having been produced to me

with the endorsement of the city treasurer thereon that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as clerk of the said city of Toledo, *doth* hereby grant and convey to the said Charles Butler, his heirs and assigns forever, the premises so sold as aforesaid. To have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof, the said Patrick J. Monahan, clerk of said city, has hereunto set his hand and seal officially and the corporate seal of said city on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN.
City Clerk.

Signed, sealed and delivered in presence of:

J. M. GLOYD.
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me, the subscriber, a notary public in and for said county, personally appeared Patrick J. Monahan, clerk of said city city of Toledo, and as such acknowledged the within instrument to be his voluntary and official act and deed for the purposes therein expressed. Given under my hand and official seal this twenty-seventh day of March, A. D., 1860.

[SEAL.] J. M. GLOYD.
Notary Public, Lucas County, Ohio.

Received for record, April 2, 1860, and recorded the — day.

JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, county recorder, of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed, recorded in volume 34, of the record of deeds of said Lucas county, at page 3, which said record of deeds is in the office of county recorder of said Lucas county and is in my custody and control as such county recorder.

137 In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D., 1905.

[SEAL.] THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

EXHIBIT No. 10.

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March, in the year one thousand, eight hundred and sixty, by and between Patrick J. Monahan, as clerk of the city of Toledo, county of Lucas, in the state of Ohio, of the one part, and Charles Butler, city of New York, of the other part, witnesseth, that whereas the collector of said city on the twenty-eighth of December, in the year one thousand, eight hundred and forty, did sell according to the provisions of the charter and ordinances of said city, in such case made and provided to John Fitch, the following described half of town lot situate in the city of Toledo, for the delinquent city taxes, interest and penalty charged thereon, to-wit: One-half of lot number thirty-one (31), in the Vistula division of Toledo, which said taxes, interest and penalty amounted to the sum of three 46-100 dollars ($3.46), and were forthwith paid by the purchaser to the collector of said city and more than two years having elapsed from the time of said sale and the said premises so sold not having been redeemed and the certificate of sale to the said John Fitch having been by him assigned and transferred to the said Charles Butler and having been produced to me with the endorsement of the city treasurer thereon, that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as clerk of the said city of Toledo, *doth* hereby grant and convey to the said Charles Butler, his heirs and assigns forever, the premises so sold as aforesaid. To have and to hold said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof, the said Patrick J. Monahan, clerk of said city, has hereunto set his hand officially and the corporate seal of said city on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of:

J. M. GLOYD.
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

138 Before me, the subscriber, a notary public, in and for said county, personally appeared Patrick J. Monahan, clerk of said city of Toledo, and as such acknowledged the within instrument to

be his voluntary and official act and deed for the purposes therein expressed. Given under my hand and official seal this twenty-seventh day of March, A. D., 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas County, Ohio.

Received for record, April 2, 1860, and recorded April 3, 1860.
JOHNATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Geo. E. Hamlin, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed recorded in volume 34, of the record of deeds of said Lucas county, at page 10, which said record of deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county and state, this 19th day of April, 1906.

[SEAL.] GEO. E. HAMLIN,
County Recorder of Lucas County, Ohio.
By CHAS. A. COTTRILL,
Deputy.

EXHIBIT No. 11.

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March, in the year one thousand, eight hundred and sixty, by and between Patrick J. Monahan, as clerk of the city of Toledo, of county of Lucas, in the state of Ohio, of the one part, and Charles Butler, of the city of New York, of the other part, witnesseth: That whereas the treasurer of said city on the twenty-seventh of December, in the year one thousand, eight hundred and forty-seven, did sell according to the provisions of the charter and ordinances of said city, in such case made and provided to Charles M. Dorr, the following described lot situate in the city of Toledo, for the Vistula grade tax- charged thereon for the year A. D., 1847, to-wit: Town lot number thirty-one, the Vistula division of the city of Toledo, which said tax amounted to the sum of seventy-six 56-100 dollars, and were forthwith paid by the purchaser to the city treasurer, and more than two years having elapsed from the time of said sale and the said premises so sold not having been redeemed and the certificate of

sale to the said Charles M. Dorr, having been assigned and
139 transferred to the said Charles Butler and having been produced to me with the endorsement of the city treasurer thereon that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as clerk of the said city of Toledo, do*th* hereby grant and convey to the said Charles Butler, his heirs and assigns forever, the premises so sold as aforesaid. To have and to hold the said premises hereby conveyed to the only proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof, the said Patrick J. Monahan, clerk of said city, has hereunto set his hand officially and the corporate seal of said city on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of:
J. M. GLOYD.
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me, the subscriber, a notary public, in and for said county, personally appeared Patrick J. Monahan, clerk of said city of Toledo, and as such acknowledged the within instrument to be his voluntary and official act and deed for the purposes therein expressed. Given under my hand and official seal this twenty-seventh day of March, A. D., 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas County, Ohio.

Received for record, April 2, 1860, and recorded April 3, 1860
JOHNATHAN WYNN,
Recorder.

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Geo. E. Hamlin, county recorder of Lucas county, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed recorded in volume 34, of the record of deeds of said Lucas county, at page 11, which said record of deeds is in the office of the county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county and state, this 19th day of April, 1906.

[SEAL.] GEO. E. HAMLIN,
County Recorder of Lucas County, Ohio,
By CHAS. A. COTTRILL,
Deputy.

140 EXHIBIT No. 12.

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March, in the year one thousand, eight hundred and sixty, by and between Patrick J. Monahan, as clerk of the city of Toledo, county of Lucas, in the state of Ohio, of the one part, and Charles Butler, city of New York, of the other part, witnesseth, that whereas the collector of said city on the twenty-eighth of December, in the year one thousand, eight hundred and forty, did sell according to the provisions of the charter and ordinances of said city, in such case made and provided to John Fitch, the following described one-half of town lot situate in the city of Toledo, for the delinquent city taxes, interest and penalty charged thereon, to-wit: One-half of lot number twenty-one (21), in the Vistula division of the city of Toledo, which said taxes, interest and penalty amounted to the sum of three 46-100 dollars, and were forthwith paid by the purchaser to the said collector, and more than two years having elapsed from the time of said sale and the said premises so sold not having been redeemed and the certificate of sale to the said John Fitch having been by him assigned and transferred to the said Charles Butler and having been produced to me with the endorsement of the city treasurer thereon, that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as clerk of the said city of Toledo, *doth*, hereby grant and convey to the said Charles Butler, his heirs and assigns forever, the premises so sold as aforesaid. **To have and to hold the said** premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof, the said Patrick J. Monahan, clerk of said city, has hereunto set his hand officially and the corporate seal of said city on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of:

J. M. GLOYD.
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me, the subscriber, a notary public, in and for said county, personally appeared Patrick J. Monahan, clerk of said city of

Toledo, and as such acknowledged the within instrument to be his voluntary and official act and deed for the purposes therein expressed. Given under my hand and official seal this twenty-
141 seventh day of March, A. D., 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas County, Ohio.

Received for record, April 2, 1860, and recorded April 3, 1860.

JOHNATHAN WYNN,
Recorder.

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Geo. E. Hamlin, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed recorded in volume 34, of the record of deeds of said Lucas county, at page 7, which said record of deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county and state, this 19th day of April, 1906.

[SEAL.] GEO. E. HAMLIN,
County Recorder of Lucas County, Ohio.
By CHAS. A. COTTRILL,
Deputy.

EXHIBIT No. 13.

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March, in the year one thousand, eight hundred and sixty, by and between Patrick J. Monahan, as clerk of the city of Toledo, county of Lucas in the state of Ohio, of the one part, and Charles Butler, of the city of New York, of the other part, witnesseth, that whereas the treasurer of said city on the twenty-seventh of December, in the year one thousand eight hundred and forty-seven, did sell according to the provisions of the charter and ordinances of said city, in such case made and provided to Charles M. Dorr, the following described lot situate in the city of Toledo, for the Vistula grade tax charged thereon for the year 1847, to-wit, town lot number nineteen (19), in the Vistula division of the city of Toledo, which said tax amounted to the sum of sixty-six 57-100 dollars, and *were* forthwith paid by the purchaser to the city treasurer and more than two

years having elapsed from the time of said sale and the said premises so sold not having been redeemed and the certificate of sale to the said Charles M. Dorr having been by him assigned and transferred to the said Charles Butler and having been produced to me with the endorsement of the city treasurer thereon, that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as clerk of
142 the said city of Toledo, *doth* hereby grant and convey to the said Charles Butler, his heirs and assigns forever, the premises so sold as aforesaid. To have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof, the said Patrick J. Monahan, clerk of said city, has hereunto set his hand and seal officially and the corporate seal of said city on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of:

J. M. GLOYD.
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me, the subscriber, a notary public, in and for said county, personally appeared Patrick J. Monahan, clerk of said city of Toledo, and as such acknowledged the within instrument to be his voluntary and official act and deed for the purposes therein expressed. Given under my hand and official seal this twenty-seventh day of March, A. D., 1860.

[SEAL.]
J. M. GLOYD,
Notary Public, Lucas County, Ohio.

Received for record, April 2, 1860, and recorded same day.

JOHNATHAN WYNN,
Recorder.

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Geo. E. Hamlin, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed recorded in volume 34, of the record of deeds of said Lucas county, at page 3, which said record of deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof, I have hereunto set my hand and affixed

my official seal at Toledo, in said county and state, this 19th day of April, 1906.

[SEAL.]

GEO. E. HAMLIN,
County Recorder of Lucas County, Ohio,
By CHAS. A. COTTRILL,
Deputy.

EXHIBIT No. 14.

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March, in the year one thousand, eight hundred and sixty, by and between Patrick J. Monahan, as clerk of the city of Toledo, county of Lucas, and in the state of Ohio, of one part, and Charles Butler, of the
143 city of New York, of the other part, witnesseth, that where as the collector of said city, on the twenty-eighth of December, in the year one thousand, eight hundred and forty, did sell according to the provisions of the charter and ordinances of said city in such case made and provided to John Fitch, the following described one-half of town lot situate in the city of Toledo, for delinquent city taxes, interest and penalty charged thereon, to-wit: One-half of lot number nineteen (19), in the Vistula division of the city of Toledo, which said taxes, interest and penalty amounted to the sum of three 46-100 dollars and were forthwith paid by the purchaser to the said collector. And more than two years having elapsed from the time of said sale and the said property so sold not having been redeemed and the certificate of sale to the said John Fitch having been by him assigned and transferred to the said Charles Butler, and having been produced to me with the endorsement of the city treasurer thereon, that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as clerk of the said city of Toledo, do*th* hereby grant and convey to the said Charles Butler, his heirs and assigns forever, the premises so sold as aforesaid. To have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof, the said Patrick J. Monahan, clerk of said city, has hereunto set his hand officially and the corporate seal of said city on the day and year first above written.

[SEAL.]

PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of:
J. M. GLOYD.
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me, the subscriber, a notary public, in and for said county, personally appeared Patrick J. Monahan, clerk of said city of Toledo, and as such acknowledged the within instrument to be his voluntary and official act and deed for the purposes therein expressed. Given under my hand and official seal this twenty-seventh day of March, A. D., 1860.

[SEAL.]

J. M. GLOYD,
Notary Public, Lucas County, Ohio.

Received for record, April 2, 1860, and recorded same day.

JOHNATHAN WYNN, *Recorder.*

144 UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Geo. E. Hamlin, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed recorded in volume 34, of the record of deeds of said Lucas county, at page 4, which said record of deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county and state, this 19th day of April, 1906.

[SEAL.]

GEO. E. HAMLIN,
County Recorder of Lucas County, Ohio,
By CHAS. A. COTTRILL, *Deputy.*

EXHIBIT No. 19.

Statement of Note to Henry Anderson, October 1, 1852,

1 July, 1841, Note for	$20,000.00	
Inst. to 1 Oct. 1855, 11 yrs. 3 mos., 6 per cent	13,500.00	
		$33,500.00

Cr.

1 June, 1848, ½ of ac. Coms. (11,934.97)	$5,967.49
Inst. to 1 Oct. '52, 4 yrs. 4 mos.	1,551.42
1 June, 1852, ½ of ac. (624.31)	312.15
Inst. 4 mos.	6.24
	$7,837.30

Less ½ of coms. refunded on sales cancelled and inst.....	312.24	
		7,525.06
1 Oct., 1849, cash paid.....	$3,376.52	
Inst. to Oct. 1., 1852, 3 yrs.....	607.86	
		3,984.38
1 Oct., 1850, cash paid.....	$2,700.00	
Inst. to 1 Oct., 1852, 2 yrs.....	324.00	
		3,024.00
1 Oct., 1851, cash paid.....	$3,110.00	
Inst. to 1 Oct., 1852, 1 yr.....	186.60	
		3,296.60
		$17,830.04
Leaving due 1 October, 1852.....	.....	$15,669.69

E. E.

CHARLES BUTLER,
W. H. GOODMAN,
Executors of H. Anderson, Deceased.

145 EXHIBIT No. 20.

$1,669.96.

Received of Charles Butler, sixteen hundred sixty-nine 96/100 dollars on his note to H. Anderson, this 1 Oct., 1852.

W. GOODMAN,
Executor of H. Anderson, Deceased.

EXHIBIT No. 21.

Received of Charles Butler, two thousand, seven hundred dollars this 1st Oct. 1850, to be applied to his note due the estate of Henry Anderson.

P. ANDERSON, *Executor.*

City of New York, 1 Oct., 1850.

EXHIBIT No. 22.

$3,376.52. NEW YORK, 6 *Oct.*, 1849.

Received of Charles Butler, three thousand, three hundred and seventy-six 52/100 dollars, which amount is to be credited and indorsed on the note of Charles Butler to Henry Anderson, dated 1 July, 1841.

W. GOODMAN,
Trustee and Executor of H. Anderson, Deceased.

EXHIBIT No. 23.

HOLLY SPRINGS, *May* 12, 1855.

Received of Charles Butler, on the 20th of April last, three thousand dollars, which amount has been endorsed on his note of $20,000 due to the estate of H. Anderson, deceased, as of that date.

W. GOODMAN,
Executor of H. Anderson, Deceased.

EXHIBIT No. 24.

Amt. due 1 Oct., 1852	$2,500.00
Amt. due 1 Oct., 1853	4,000.00
Int., on $14,000, 1 yr. to Oct. 1853	840.00
	$7,340.00
Interest	90.10
	$7,430.10

7,340 dols. NEW YORK, *October* 1, 1853.

For value received, I promise to pay to the order of W. Goodman and P. Anderson, trustees and executors of the estate of Henry Anderson, deceased, seven thousand, three hundrd and forty dollas, with interest on or before the first of December next, and the payment of $7,340 as of 1 October, 1853, to be endorsed on my note due the estate of H. Anderson.

CHARLES BUTLER,
By S. H. FLEETWOOD,
His Attorney.

146 Endorsed as follows: Pay Walter Goodman, P. Anderson, executors and trustees of the estate of H. Anderson.

EXHIBIT No. 25.

NEW YORK, *September* 27, 1852.

Received from Charles Butler, five thousand, nine hundred and sixty-seven 49 100 dollars ($5,967.49), on the 1 June, 1848, and also the sum of fifteen hundred and fifty-one 42 100 dollars ($1,551.42), for interest from 1 June, 1848, to 1 Oct., 1852, on the first named sum, making together $7,518.91, seven thousand, five hundred and eighteen 91 100 dollars, to be credited on Charles Butler's note held by the executors of Henry Anderson, dated 1 July, 1841, for $20,000.

$5,967.49
1,551.42

$7,518.91

W. GOODMAN,
Executor and Trustee of H. Anderson, Deceased.

EXHIBIT No. 26.

NEW YORK, *September* —, 1852.

Received from Charles Butler, Esq., two thousand dollars, to be credited on his note held by the executors of Henry Anderson for $20,000, dated 1 July 1841, as of the 1 October, 1851.

$2,000.

W. GOODMAN,
Executor and Trustee of H. Anderson, Deceased.

EXHIBIT No. 27.

$2,172.70. MEMPHIS, TENN., *March* 8, 1861.

Pay to the order of F. R. Farnsworth, treasurer, twenty-one hundred and seventy-two 70-100 dollars.

Value received and charge the same to the account of

JAMES H. ANDERSON.

To Charles Butler, No. 12 Wall-street, New York.

No. —.

(Endorsed:) 744. Pay American Exchange Bank, New York or order.

T. R. FARNSWORTH, *Treasurer.*

(Endorsed:) "Received payment, American Exchange Bank."

EXHIBIT No. 29.

HOLLY SPRINGS, *March* 2, 1854.

Charles Butler, Esq.

DEAR SIR: I enclose for the credit of H. and P. Anderson account my check as executor, etc., No. 61 on Manhattan Com-
147 pany for five thousand dollars. It is almost impossible to procure exchange on New York or New Orleans, and it cannot be had only at very high rates of premium.

I will in a day or two give you the information you desire in regard to our sales here and in Arkansas, and our prospects for collections.

Mr. Fleetwood last fall gave us a note of $7,000 on your debt to the estate of H. Anderson, due, I believe, the 1st December. Will you advise me if the note has been paid, if not paid, at what time may we rely on its payment?

Yours, etc.,

W. GOODMAN.

EXHIBIT No. 34.

No. 12 WALL ST.,
NEW YORK, *March* 2, 1860.

W. Goodman.

Mr. DEAR SIR: I have just received your letter of the 22d Feb. After I had written to you on the 9th, Mr. Brunson, the party who was negotiating with me for the Toledo property, came to New York and wanted to negotiate for the entire block instead of a part of it, as had been talked of; after three days' constant at it we concluded a bargain, the details of which I have communicated to you, for the whole block at $17,500, but he became uneasy about the situation of the title and would not agree to pay any money till I was prepared to give him a good deed with certificate of title. I enclose a copy of the clause in the agreement between us that you may understand perfectly the great importance to me of having the deed now lying in the Manhattan Bank in escrow delivered to me that I may make a proper deed of warranty to Mr. Brunson as early as practicable that he may have no possible excuse for backing out, which would now be serious to us all.

I also hand you copy of the account as finally settled on 1 October, 1854, by you and Mr. Anderson, and which we had before us, on 1 October, 1855; you and Mr. Anderson being then here and at which date you executed the deed and lodged it in escrow with W. H. Halstead, of Manhattan Bank, to be delivered to me on the order of either of you.

Since then the only payment made was of $4,000 to Peter Anderson on 1 January, 1857, of which you have also a statement, as you recollect. I hold his draft paid by me for it. By the terms of the agreement with James made in 1852, after he became
148 of age, as you recollect, I was to pay 6 per cent interest. In the fall of 1855 when we had the final adjustment here I agreed to pay 7 per cent after that date and I have so computed the amount, making $9,183.88 on 1 January last. This of course is simple interest and is in accordance with our understanding.

If you will give me an order on Mr. Halstead for the deed I will lodge with him a stipulation to pay over the money to be received from Mr. Brunson on the first day of May, (the $2,000 and interest on it from 25 December last) and also to place with him the bond and mortgage or notes and mortgage which I am to take from Mr. Brunson for $15,000 duly assigned by me to James H. Anderson as collateral security for the payment of the balance due from me. I want to place the papers at the earliest date practicable in the hands of the lawyer, M. R. Waite, Esquire, of Toledo, whose certificate of title I am bound to furnish to Mr. Brunson. Of course, there is no transfer of title till the whole thing is consummated.

Please give your attention to this to aid me in perfecting this sale, which I have labored to accomplish to effect the payments to Mr. Anderson.

I will write you on other matters in another letter.

In haste, truly yours,

CHARLES BUTLER.

EXHIBIT No. 35.

HOLLY SPRINGS, *March* 19, 1860.

Charles Butler, Esquire.

DEAR SIR: I duly received your letter in reference to your indebtedness to James H. Anderson or the estate of his deceased father. I have delayed a reply for the purpose of having an interview with James, who was at the time on his plantation. He is not here and does not seem *in*disposed to comply with your wishes, but thinks the mode of computing interest on payments not in accordance with law or usage. This I think will be the only difficulty in the way of the adjustment you desire.

Mr. Anderson's wife is now quite ill. It is his intention to start for New York with her as soon as she is able to travel and will then attend to the settlement with you in person.

I will have the accounts of the office made out as you desire, but may bring them up to the first of April instead of March, as you suggest.

149 I leave tomorrow for Washington city and may visit New York before my return home.

Yours, etc.,

W. GOODMAN.

EXHIBIT No. 36.

No. 12 WALL STREET,
NEW YORK, *7th May*, 1860.

J. H. Anderson, Esquire.

MY DEAR SIR: I am happy to say that the sale to Mr. Brunson of the Toledo property was concluded, and enclosed I hand you certificate of deposit for $2,041, the amount of cash payment to apply on my debt (the balance of $9,360.97 due on 1 May instant) to your father's estate.

The security which I have taken from Mr. Brunson for the balance of the purchase money I will have duly assigned and placed in the hands of Mr. Halstead, of the Manhattan Bank, as stipulated to your order. I shall want a power from you to take these and send them forward to Toledo as payments come due for the payments are to be made at Toledo, an inconvenience I tried to avoid but could not.

I hope that you and Mr. Goodman got home safely, and that you found your wife in better health.

Yours truly,

CHAS. BUTLER.

EXHIBIT No. 38.

No. 12 WALL STREET,
NEW YORK, *9th August*, 1860.

J. H. Anderson, Esquire.

MY DEAR SIR: Enclosed I hand you check on the Manhattan Bank for $500, five hundred dollars, on account of debt due you as per statement of amount due on May 1 last, which amount please indorse. On the 7th of May I sent you certificate of deposit for $2,041 on same account which I presume you duly received, tho I have no acknowledgment. The payment by Mr. Brunson, 20th July, just received, was $465. I have made it an even sum of $500.

In haste, truly yours,

CHARLES BUTLER.

EXHIBIT No. 39.

NEW YORK, 1 *February*, 1861.

J. H. Anderson, Esquire.

MY DEAR SIR: I have in deposit, subject to your draft or drafts on me, $2,119.49, twenty-four hundred and nineteen 49-100 dollars, payment on account of my debt to you which has been collected from the collateral of Mr. Brunson's note and interest due on the 20th January. This payment as I compute the interest will leave due to you on the 28th January, fifty-one hundred dollars.

150

I hope to hear something from you respecting the state of things in the south particularly in your state and neighborhood. We feel of course, the deepest interest in the course of events and yet indulge hopes that there may be a favorable turn and the union be preserved.

In haste, dear sir, truly yours,

CHARLES BUTLER.

Thereupon the defendant further to maintain the issues upon his part, offered in evidence duly certified transcript of the proceedings and final record in the court of common pleas of Lucas county, Ohio, in cause No. 55794 therein, entitled United States Mortgage & Trust Company, plaintiff, vs. Peter Anderson, Rosewell E. Messinger et al., defendants, said certified transcript being hereto attached, marked "Exhibit D," and hereby made a part of this bill of exceptions; and same being received in evidence, defendant by his counsel read in evidence therefrom as follows:

No. 55794.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
PETER ANDERSON et al.

Pleas before the court of Common Pleas within and for the county of Lucas and state of Ohio, at a term thereof begun and held at the court house in the city of Toledo, on Monday, the 24th day of September, in the year of our Lord one thousand nine hundred and six.

Present Honorable Jason A. Barber,
Present Honorable Julian H. Tyler,
Present Honorable Lindley W. Morris,
Present Honorable Reynolds R. Kinkade,
Presiding Judges.

Be it remembered that heretofore, to-wit, on the 25th day of October, 1906, plaintiff by its attorney filed in said court a petition in the above entitled cause, which petition is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

151 *Petition.*

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
against
PETER ANDERSON, ROSEWELL E. MESSINGER, ROSEWELL E. MESSINGER, Trustee for Charles Ruell Messinger, Estelle P. Messinger, Emily O. Butler, Jacob Ramser, Barbara Ramser, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdale, William J. Frasch, Trustee; Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford, John H. Serrels, The Detroit & Tennessee Realty Company, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves, Sick & Accident Association of Toledo, The Hygienic Toothpick Company, The Grasser-Brand Brewing Company, The Huebner-Toledo Breweries Company, John Ramser, Emma E. Andres, and Frieda Barbara Schneider, Defendants.

The plaintiff, The United States Mortgage & Trust Company, says that it is a corporation duly incorporated and organized under the laws of the state of New York.

That the defendant, The Detroit & Tennessee Realty Company is a corporation duly incorporated under the laws of the state of Tennessee.

That each of the following named defendants is a corporation duly incorporated and organized under the laws of the state of Ohio, to-wit: The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves, The Sick and Accident Association of Toledo, The Hygienic Toothpick Company, The Grasser-Brand Brewing Company, and The Huebner Toledo Breweries Company.

152 That the defendant, Peter Anderson, is a citizen and resident of the state of Tennessee; that the defendant Emily O. Butler, is a citizen and resident of the state of New York; and that each of the other defendants not hereinabove mentioned, is a citizen and resident of the state of Ohio.

Plaintiff further says for its first cause of action:

That on the first day of November, 1897, the defendants, Rosewell E. Messenger and Rosewell E. Messenger, trustee, made and delivered to the plaintiff their promissory note of that date, on which there are no credits nor endorsements, and of which the following is a copy:

"On the first day of November, 1907 (without grace) for value received, I promise to pay to the order of the United States Mortgage & Trust Company, a corporation organized under the laws of the state of New York, the principal sum of forty-five thousand dollars and interest thereon from the date hereof until paid at the rate of five per centum per annum, payable on the first days of May and November, according to the terms of twenty annexed coupon notes executed by me simultaneously herewith and numbered from one to twenty. Said principal sum and interest shall be paid in United States gold coin of the present standard of weight and fineness or its equivalent, together with the current rate of exchange on the city of New York at the Merchants National Bank, Toledo, Ohio, with the privilege of paying $5,000.00 or less on any interest date. This contract is to be construed in all respects and enforced according to the laws of the state of Ohio, dated at Toledo, Ohio, November 1, 1897.

ROSEWELL E. MESSENGER,
ROSEWELL E. MESSENGER, *Trustee*."

That the plaintiff is still the owner and holder of said promissory note; that there is due to plaintiff from said defendants, Rosewell E. Messenger and Rosewell E. Messenger, trustee, upon said promissory note, the sum of forty-five thousand ($45,000) dollars, with interest thereon from May 1, 1906.

Plaintiff further says for its second cause of action:

That on the first day of November, 1897, the defendants, Rosewell E. Messenger and Rosewell E. Messenger, trustee, made and delivered to the plaintiff, their promissory note of that date, on which there are no credits nor endorsements, and of which the following is a copy:

"On the first day of November, 1907 (without grace) for value received, I promise to pay to the order of the United States
153 Mortgage & Trust Company, a corporation organized under the laws of the state of New York, the principal sum of forty-five thousand dollars and interest thereon from the date hereof until paid at the rate of five percentum per annum, payable on the first days of May and November, according to the terms of twenty annexed coupon notes executed by me simultaneously herewith and numbered from one to twenty. Said principal sum and interest shall be paid in United States gold coin of the present standard of weight and fineness or its equivalent, together with the current rate of exchange on the city of New York at the Merchants National Bank, Toledo, Ohio, with the privilege of paying $5,000.00 or less on any interest date. This contract is to be construed in all respects and enforced according to the laws of the state of Ohio, dated at Toledo, Ohio,

November 1, 1897.

ROSEWELL E. MESSENGER.
ROSEWELL E. MESSENGER, *Trustee.*"

That the plaintiff is still the owner and holder of said promissory note; that there is due to plaintiff from said defendants, Rosewell E. Messenger and Rosewell E. Messenger, trustee, upon said promissory note, the sum of forty-five thousand ($45,000) dollars, with interest thereon from May 1, 1906.

That to secure the payment of said promissory note, the said defendants, Rosewell E. Messenger and Rosewell E. Messenger, trustee, executed and delivered to the plaintiff their certain mortgage deed and thereby conveyed to the plaintiff, its successors and assigns, the following real estate situate at Toledo, in the county of Lucas, and state of Ohio, and bounded and described as follows:

"Beginning at the intersection of the southeasterly boundary line of St. Clair street and the southwesterly boundary line of Cherry street; running thence in a southeasterly direction along said boundary line of Cherry street a distance of two hundred and six and 40/100 (206.40) feet; thence in a southwesterly direction at right angles with Cherry street, a distance of sixty-four and 99/100 (64.99) feet; thence in a northwesterly direction along a line parallel with Cherry street to Summit street; thence in a northeasterly direction along Summit street to St. Clair street; thence in a northeasterly direction along St. Clair street to the place of beginning, being a part of lots thirty (30), thirty-one (31), thirty-two (32), *thirty-two* (32), ten hundred and eight (1008), and ten hundred and nine (1009) in the Vistula division of said city."

154 That said mortgage contained the condition in substance, that if the said defendants, Rosewell E. Messinger and Rosewell E. Messinger, trustee, should pay or cause to be paid, the said promissory note to the plaintiff, its successors or assigns, when the same became due, with interest, and should keep and perform all and singular the covenants and agreements in said mortgage contained for the mortgagor to keep and perform, then said mortgage

should become void, otherwise to be and remain in full force and virtue; that said mortgage contained a further condition in substance, that if failure should be made in the payment of either principal or interest when due, or if failure should be made in the performance of any of the other covenants or agreements in said mortgage contained, the entire debt remaining secured by the mortgage, should at once become due and payable if the holder thereof so elect; that said mortgage contained a covenant that the mortgagors, the defendants Rosewell E. Messinger and Rosewell E. Messinger, trustee, should pay all taxes and assessments levied upon the premises herein described when due and payable, according to law and before they become delinquent.

That said mortgagors, defendants as aforesaid, failed to pay the taxes due on said premises and payable in June, 1906, so that the same are now delinquent, whereby the whole sum has become due and said mortgage deed has become absolute.

That on the 16th day of December, 1897, the said mortgage was delivered to the recorder of said county of Lucas for record and was by him duly recorded on the 20th day of December, 1897, in Volume 211 of records of mortgages of said county, at page 603.

Plaintiff further says that the defendant, Peter Anderson, claims to be the owner in fee simple of said premises; that the defendant Emily O. Butler, claims an interest in said premises, as mortgagee adverse and hostile to the claim of plaintiff; that the defendants, Jacob Ramser, Barbara Ramser, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Frasch, trustee, Francis P. Chapin, Rudolph A. Bartley, Henry R. Fowler, Chester D. Clapp, Catherine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford, John H. Serrels, The Detroit & Tennessee Realty Company, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves, Sick & Accident Association of Toledo, The Hygienic Toothpick Company,
The Grasser-Brand Brewing Company, The Huebner-Toledo
155 Breweries Company, John Ramser, Emma E. Andres and
Frieda Barbara Schnieder, claim an interest in said premises as lessees, adverse and hostile to the claim of plaintiff; plaintiff therefore asks that they may be required to answer and set forth their respective claims or be forever barred.

Wherefore the plaintiff prays that the court may determine the amount due it upon said promissory note and render judgment therefor; that said mortgage may be foreclosed and said premises ordered to be sold and the proceeds applied on the said debt, and for all necessary equitable relief.

B. A. HAYES,
Attorney for Plaintiff.

STATE OF OHIO,
Lucas County, ss:

Birchard A. Hayes, being first duly sworn, says that he is the attorney for the plaintiff; that the plaintiff is a corporation, for

which reason affiant makes this affidavit; and that the statements in the foregoing petition are true as he believes.

BIRCHARD A. HAYES.

Sworn to before me and subscribed in my presence this 18th day of October, 1906.

[SEAL.] GEO. P. HAHN,
Notary Public, Lucas County, Ohio.

Endorsed on said petition and filed therewith was a præcipe for summons in said cause.

Thereupon a summons in said cause was issued by the clerk of said court.

Appearing at pp. 1-7 of said record.

On the 15th day of November, 1906, defendant Emily O. Butler by her attorney filed in said court an answer and cross-petition in the above entitled cause which answer and cross-petition is in the words and figures as follows, to-wit:

Common Pleas Court, Lucas County, Ohio.

No. 55794.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
PETER ANDERSON et al.

Answer and Cross-petition of the Defendant Emily O. Butler.

The defendant, Emily O. Butler, for answer to the petition of the plaintiff herein, and by way of cross-petition thereto,

For a first cause of action says: That by reason of the facts herein stated, and the further facts set forth in her second cause of action herein, to which reference is hereby made, there is due
156 her from the defendant, Rosewell E. Messenger upon his promissory note, the sum of five hundred dollars ($500) with interest from September 27, 1906 at six per cent per annum, payable semi-annually, which she claims, a copy of which note, there being no credits or endorsements thereon, is as follows:

$5,000.00 TOLEDO, OHIO, *September* 27, 1906.

Three (3) years after date I promise to pay to the order of Emily O. Butler five thousand ($5,000.00) and no-100 dollars at the office of Willard Parker Butler, 59 Wall Street, New York City.

Value received, with interest at six per cent (6 per cent) per annum, payable semi-annually.

No. — Due 9-27-09.

(Signed) ROSEWELL E. MESSENGER.

This answering defendant further says; for a second cause of action.

That at the time of the execution and delivery of the above described note, and to secure the payment thereof, said defendant, Rosewell E. Messenger, executed and delivered to this answering defendant his certain mortgage deed, dated September 27, 1906, whereby he conveyed to her, in fee simple, the following described real estate, viz:

Lots numbered twenty (20), twenty-one (21) except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof, thirty (30), thirty-one (31), thirty-two (32), one thousand and eight (1,008) and one thousand and nine (1,009), all in the Vistula division of the city of Toledo, Lucas county, state of Ohio.

That the above described real estate includes all the property described in the petition, together with other property.

That Harriet E. Messenger, the wife of said Rosewell E. Messenger, named in the petition, as, and who is the same person as the defendant, Estelle P. Messenger, joined in said mortgage deed and thereby conveyed to this answering defendant all her right, title and interest in said premises, by way of dower or otherwise.

That said conveyance was made subject to the conditions that if the said Rosewell E. Messenger, his heirs or assigns, should well and truly pay the note aforesaid, according to the tenor thereof, to this answering defendant, her heirs or assigns, together with all taxes, assessments and insurance premiums, then the said mortgage deed should be void; otherwise the same should remain in full force and virtue.

And it was further provided in said mortgage deed that if failure be made in payment of either principal, interest, taxes, assessments or insurance premiums, or any part thereof when due and the same should remain in arrears for thirty days, the whole of
157 said principal sum should become and be then due, and said mortgagee, her heirs or assigns, should be and were thereby authorized in said case of default to proceed at their option for the collection of the whole amount unpaid thereon.

That the taxes due and payable on said premises have not been paid and the same have remained in arrears for more than thirty days, and this answering defendant, under the terms of said mortgage deed, now exercises her option to declare that the whole of said note is now due and payable.

That no payment either of principal or interest has been made upon said note and that there is now due this answering defendant from said defendant, Rosewell E. Messenger, upon said indebtedness, the sum of five thousand dollars ($5,000), with interest thereon from September 27, 1906, at six per cent per annum, payable semi-annually.

That by reason of said mortgage deed this answering defendant has a lien upon said mortgaged premises to secure the payment of said note which lien is next after the lien of the plaintiff and the taxes.

That said defendant, Peter Anderson, has no*t* right, title or interest in and to said property.

That said mortgage deed was delivered to the recorder of Lucas county, Ohio, on September 28, 1906, at 3:30 o'clock P. M., for record, and was thereafter duly recorded by him in Volume 328 at page 301 of the records of mortgages of said county.

Wherefore, this answering defendant, asks for a judgment against the defendant, Rosewell E. Messenger, for said sum of five thousand dollars ($5,000), with interest from September 27, 1906, at six per cent per annum payable semi-annually, and that said mortgage be foreclosed and said premises sold as upon execution to satisfy the amount found to be due this answering defendant, and the costs herein; and for all other and further relief to which in equity she may be entitled.

O. B. SNIDER,
Attorney for Defendant Emily O. Butler.

STATE OF OHIO,
County of Lucas, ss:

O. B. Snider, being first duly sworn, says he is the attorney for the answering defendant, Emily O. Butler, in the above entitled action, that said defendant is a non-resident of and now absent from the state of Ohio, and that the statements made in the foregoing answer are true as affiant verily believes.

O. B. SNIDER.

Sworn to before me and subscribed in my presence this
158 15th day of November, 1906.

[SEAL.] JAS. HARRINGTON BOYD,
Notary Public, Lucas County, Ohio.

Endorsed on said answer and cross-petition and filed therewith was a precipe for summons in said cause.

Thereupon a summon in said cause was issued by the clerk of said court.

Appearing at pp. 12-15 of said record.

On the 19th day of November, 1906, defendant, Rosewell E. Messinger, by his attorneys, filed in said court an answer and cross-petition in the above entitled cause which answer and cross-petition is in the words and figures as follows:

Answer and Cross-petition of the Defendant Rosewell E. Messinger.

In the Court of Common Pleas, Lucas County, State of Ohio.

No. 55794.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,

vs.

PETER ANDERSON, ROSEWELL E. MESSINGER; ROSEWELL E. MESSINGER, Trustee for Charles Ruell Messinger; Estelle P. Messinger, Emily O. Butler, Jacob Ramser, Barbara Ramser, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdale, William J. Frasch, Trustee; Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford, John H. Serrels, The Detroit & Tennessee Realty Company, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves, Sick & Accident Association of Toledo, The Hygienic Toothpick Company, the Grasser-Brand Brewing Company, The Huebner-Toledo Breweries Company, John Ramser, Emma E. Andres, and Frieda Barbara Schneider, Defendants.

159 The defendant, Rosewell E. Messinger, for answer to the petition and by way of cross-petition herein, says:

That he and the defendant, Estelle P. Messenger, his wife, each for some years last past has been, and each now is a citizen and resident of the state of Ohio; that this answering defendant, prior to and on November 1, 1897, was trustee for Charles Ruel Messenger; that said trusteeship has since been fully settled and determined; that the plaintiff, United States Mortgage & Trust Company, is a corporation duly incorporated, organized and existing under and by virtue of the laws of the state of New York; that the defendant, The Detroit & Tennessee Realty Company, is a corporation duly incorporated, organized and existing under and by virtue of the laws of the state of Tennessee; that the defendants, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves and The Hygienic Toothpick Company, respectively, are co-partnerships formed for the purpose of and doing business in the state of Ohio; that the defendants, The Sick & Accident Association of Toledo, The Grasser-Brand Brewing Company and The Huebner-Toledo Breweries Company are each corporations duly incorporated, organized and existing under and by virtue of the laws of the state of Ohio; that for some years past the defendant, Emily O. Butler, has been and now is a citizen and resident of the state of New York; and that for some years past the following defendants, viz.: Jacob Ramser, Barbara Ramser, John Ramser, Emma E. Andres, Frieda Barbara Schneider, George W. Ruhl, Charles A.

Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Frasch, trustee, Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford and John H. Serrles have been and now are citizens and residents of the state of Ohio.

I. For answer to the first cause of action set forth in the petition herein, this answering defendant, Rosewell E. Messenger, admits that on November 1, 1897, he individually and as trustee for said Charles Ruel Messenger, made and delivered to the plaintiff, United States Mortgage & Trust Company, a promissory note of said date for forty-five thousand dollars ($45,000), a copy of which is set forth in said first cause of action; that the interest has been paid on said note to May 1, 1906; that there are no endorsements thereon; that said plaintiff, United States Mortgage & Trust Company, is the owner and holder thereof; but this answering
160 defendant denies that the principal amount of said note has become due and payable.

II. For answer to the second cause of action set forth in the petition herein, this answering defendant, Rosewell E. Messinger, adopts and makes part hereof as fully as though herein repeated, each and all of the foregoing allegations and statements, and further says that the note described in said second cause of action is the same obligation set forth and described in the first cause of action in said petition. This answering defendant admits the execution and delivery by him, individually and as trustee for said Charles Ruel Messenger, of the mortgage described in said second cause of action; that the terms and conditions of said mortgage were and are as alleged by plaintiff in said second cause of action; that said mortgage was duly recorded as alleged; and that the taxes and assessments on said premises which became due and payable June 20, 1906, and subsequent thereto, have not been paid and are delinquent, but this answering defendant demands strict proof from said plaintiff with respect to the amount due and to become due under said mortgage.

This answering defendant further says that the defendant, Peter Anderson, claims to be the owner of said mortgaged premises, but denies that said Anderson has any right, claim, interest or estate of any kind or nature whatsoever in or to said mortgaged premises or any part thereof. This answering defendant admits that the defendant, Emily O. Butler, has an interest in said premises as mortgagee thereof, but says that the indebtedness secured by said mortgage is not due and payable.

This answering defendant further says that each of the following defendants, viz: The Detroit & Tennessee Realty Company, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves, Sick & Accident Association of Toledo, The Hygienic Toothpick Company, The Grasser-Brand Brewing Company, The Huebner-Toledo Breweries Company, James Ramser, Barbara Ramser, John Ramser, Emma E. Andres, Frieda Barbara

Schneider, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Frasch, trustee, Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catharine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford and John H. Serrles, have an interest in certain parts of said mortgaged premises under leases respectively entered into between this answering defendant and each of said defendants and that each of said lessee defendants was for
161 some time prior to, at the commencement of this action, since and now in possession of the respective portions of said premises described in said leases.

III. For further answer to the petition and by way of cross-petition herein, the defendant and cross-petitioner, Rosewell E. Messenger, says that he adopts and makes part hereof each and all of the foregoing allegations and statements as fully as though same were set forth at length; and further says that since 1896, and for a long time prior to and at the time of the commencement of this action, he was, has ever since been and now is in the actual possession of the real estate described in said petition; that during all of said time he has been and now is the owner of said premises; that said defendant, Peter Anderson, gives out and publicly states and claims that he is the owner and entitled to the possession of said premises, as remainder man under the last will and testament of his grandfather, Henry Anderson, deceased, which statement and claim said defendant and cross-petitioner, Rosewell E. Messenger, has at all times disputed and denied and now disputes and denies; and further says that on or about October 1, 1855, Peter Anderson and Walter Goodman, the duly authorized, qualified and acting executors and trustees under the last will and testament of said Henry Anderson, deceased, grandfather of said defendant, Peter Anderson, for a full and valuable consideration and in pursuance of authority duly conferred upon them by said last will and testament of said Henry Anderson, deceased, duly executed, acknowledged and delivered to Charles Butler, then living, but since deceased, a warranty deed in due form of law, conveying to said Charles Butler, his heirs and assigns, the title to all of the premises described in the petition herein and other premises, part of which was adjacent thereto, and described in said deed as follows:

All those certain lots or parcels of land situate, lying and being in the Vistula division of the city of Toledo, county of Lucas, state of Ohio, known and designated as lots numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1,008), one thousand and nine (1009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000) and one thousand and one (1,001), said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street, as said lots were laid out and numbered on the recorded map of said city; together with all and singular the edifices, buildings, rights, privileges, advantages, hereditaments and appurtenances to the
162 same belonging, or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and

That said deed was thereafter duly filed for record with and was recorded by the recorder of Lucas county, Ohio, at page 110 and following in volume 34 of the public records of deeds of Lucas county, Ohio.

Said defendant and cross-petitioner, Rosewell E. Messenger, further says that after the execution, acknowledgment, delivery and record of said deed, as aforesaid, cross-petitioner's grandfather, Calvin Bronson, of Toledo, Ohio, then living, but since deceased, and the person under whom said defendant and cross-petitioner, Rosewell E. Messenger, claims title to said mortgaged and other premises, in good faith, in full reliance upon the title theretofore acquired to said premises by said Charles Butler, and for a full and valuable consideration, to-wit: $17,500, by said Calvin Bronson, then paid to said Charles Butler, purchased from said Charles Butler all of the property in the second preceding paragraph and in the petition described; that thereupon said Charles Butler, on or about April 23, 1860, upon and for said consideration paid by said Calvin Bronson, as aforesaid, duly conveyed said premises to said Calvin Bronson, his heirs and assigns, forever, by deed duly recorded at page 115 and following in volume 34 of the public records of deeds of Lucas county, Ohio; that thereafter, on or about December, 1895, this defendant and cross-petitioner, Rosewell E. Messenger, by regularly executed deeds of conveyance to himself from the other heirs of said Calvin Bronson, deceased, now owns, holds and is in possession of all of that portion of said premises and property next herein below described, and has succeeded to, acquired and owns the entire right, title, estate and interest therein acquired by said Calvin Bronson from said Charles Butler, as aforesaid, viz:

All of lot nineteen (19), except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof; all of lot twenty (20), all of lot twenty-one (21), and all of lots thirty (30), thirty-one (31), thirty-two (32), one thousand and eight (1,008) and one thousand and nine (1,009), all in the Vistula division of the city of Toledo, Lucas county and state of Ohio, together with the improvements, privileges and appurtenances unto said premises belonging.

Said defendant and cross-petitioner, Rosewell E. Messenger, further says that shortly after said Calvin Bronson acquired title to the mortgaged premises described in the petition herein and other premises adjacent thereto, all described in said deed from
163 said Charles Butler, said Calvin Bronson entered into the possession of said premises and constructed large and valuable improvements thereon, and during his life time paid all taxes and assessments levied and assessed on said premises.

Said defendant and cross-petitioner, Rosewell E. Messenger, further says that he acquired his title to said premises as aforesaid, for a full and valuable consideration, paid in good faith and in full reliance upon the title theretofore acquired to said premises by said Calvin Bronson, deceased, and without knowledge or notice of any kind whatsoever of any claim on the part of said defendant, Peter Anderson, to any estate, title or interest in or to said premises, or any part thereof.

That since said defendant and cross-petitioner, Rosewell E. Messenger, acquired title to said premises as aforesaid and fully relying thereon, he has made extensive and valuable improvements upon said premises last above described; and that during all of said time until June 20, 1906, he paid all of the taxes and assessments levied and assessed thereon.

The defendants and cross-petitioner, Rosewell E. Messenger, further says that in a certain action in ejectment heretofore begun in this court by Peter Anderson, as plaintiff, against The United Realty Company and this defendant and cross-petitioner and others, as defendants, and known as cause No. 53,924 in this court, the claim heretofore, therein and since made by said defendant, Peter Anderson, to be the owner of said premises as remainder man under the will of said Henry Anderson, deceased, was, at the January term, 1905, of said court, heard and finally determined and adjudicated as to a part of said premises in favor of this defendant and cross-petitioner, Rosewell E. Messenger, and against said defendant, Peter Anderson, which decision remains unreversed and in full force and effect.

Said defendant and cross-petitioner, Rosewell E. Messenger, further says that on or about December 24, 1904, said defendant, Peter Anderson, brought an action in ejectment against him in the United States Circuit Court for the Northern District of Ohio, Western Division, known therein as cause No. 1,479, wherein said defendant, Peter Anderson seeks to recover the possession of said premises owned by said defendant and cross-petitioner, as aforesaid, and damages for the alleged wrongful detention thereof from said defendant, Peter Anderson; that said defendant and cross-petitioner, Rosewell E. Messenger, has answered in said action denying the claims made by said defendant, Peter Anderson, plaintiff
164 herein; that said action is yet pending in said court and undetermined; that said defendant, Peter Anderson, and his counsel give out and publicly state that they expect and intend to urge said case for trial at the ensuing December term of said court; that under the rules of practice applicable to said United States Circuit Court, said defendant and cross-petitioner, Rosewell E. Messenger, has not the right to allege and prove in said action the facts which establish the equitable defenses necessary to be alleged and proven in order to protect, maintain, establish and assure him in his said title to said premises; and that this defendant and cross-petitioner is without adequate remedy at law herein.

Said defendant and cross-petitioner, Rosewell E. Messenger, asks that said defendant, Peter Anderson, may be required to answer herein and set forth said adverse estate or interest, if any, claimed by him in and to said mortgaged and other premises, and that the same may be adjudged and decreed to be null, void and of no effect; that said defendant, Peter Anderson, may be restrained and enjoined by this court from proceeding further in said action at law in said Federal court; and that said action may be stayed until the final adjudication and determination of the above entitled action.

Wherefore, said defendant and cross-petitioner, Rosewell E. Mes-

senger, prays that an account may be taken of the amount due and to become due plaintiff, United States Mortgage & Trust Company, under its said mortgage; that an account may be taken of the amount to become due the defendant, Emily O. Butler, under her said mortgage; that the priority of said liens may be determined; that the pretended claim of said defendant, Peter Anderson, to said mortgaged and adjacent premises next hereinabove described, may be declared to be null and void and of no force or effect; and that the possession and title of said defendant and cross-petitioner, Rosewell E. Messenger, may be quieted against the same.

Said defendant and cross-petitioner, Rosewell E. Messenger, prays further for all other proper equitable relief.

By KING & TRACY,
Attorneys for the Defendant and Cross-Petitioner Rosewell E. Messenger.

STATE OF OHIO,
Lucas County, ss:

Rosewell E. Messenger, being first duly sworn, upon his oath says that he is the defendant and cross-petitioner in the above entitled action, who files the foregoing answer and cross-petition, and that the statements therein contained are true, as he verily believes.

ROSEWELL E. MESSENGER.

165 Sworn to before me and subscribed in my presence this 19th day of November, 1906.

[SEAL.] FRANK W. CAUGHLING,
Notary Public within and for Lucas County, Ohio.

Endorsed on said answer and cross-petition and filed therewith was a præcipe for summons in said cause.

Thereupon a summons in said cause was issued by the clerk of said court.

Appearing at pages 16-25 of said record.

On the 18th day of March, 1907, being the sixtieth day of the January term, 1907, an order in said cause was made, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

55794.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
PETER ANDERSON et al.

Upon application to the court, Defendant Anderson was given leave to answer in ten days.

Appearing at page 39 of said record.

On the 27th day of March, 1907, there was filed in said court a demurrer of Peter Anderson to petition in the above entitled cause which demurrer is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al., Defendants.

Demurrer to Petition.

Now comes the defendant, Peter Anderson, and demurs to the petition of the plaintiff filed herein, on the following grounds:

1. There is a mis-joinder of parties defendant. This defendant is the owner of the premises described in plaintiff's petition in fee simple and his title to said premises cannot be determined in this action.

2. Several causes of action are improperly joined. Plaintiff seeks to foreclose a mortgage executed by Messinger and wife only, and at the same time seeks to bar this defendant of his legal title to said property.

3. Separate causes of action against several defendants are improperly joined. The plaintiff has joined with the maker of a mortgage certain tenants occupying the premises and also this defendant, who is the owner of the premises on which said mortgage was executed, and this defendant did not join in the execution of said mortgage.

166 4. Plaintiff's petition does not state facts sufficient to constitute a cause of action against this defendant.

PETER ANDERSON,
By RHEA P. CARY AND
C. A. THATCHER,
His Attorneys.

Appearing at pages 41-42 of said record.

On the 27th day of March, defendant, Peter Anderson, by his attorneys, filed in said court a demurrer to answer and cross-petition of Emily O. Butler, in the above entitled cause which demurrer is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al., Defendants.

Demurrer to the Answer and Cross-Petition of Emily O. Butler.

Now comes the defendant, Peter Anderson, and demurs to the answer and cross-petition of the defendant, Emily O. Butler, on the following grounds:

(1) There is a misjoinder of parties defendant in this action.

(2) Several causes of action are improperly joined in the answer and cross-petition of the said Emily O. Butler.

(3) Separate causes of action against several defendants are improperly joined in the answer and cross-petition of Emily O. Butler.

This defendant has no interest in the controversy between the said Emily O. Butler and Rosewell E. Messenger.

(4) The answer and cross-petition of Emily O. Butler and the petition in this case do not state facts sufficient to constitute a cause of action against this defendant.

PETER ANDERSON,
By RHEA P. CARY AND
C. A. THATCHER,
His Attorneys.

Appearing at page 44 of said record.

On the 27th day of March, defendant, Peter Anderson, by his attorneys, filed in said court a demurrer to answer and cross-petition of Rosewell E. Messinger in the above entitled cause, which demurrer is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

167 UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al., Defendants.

Demurrer to Answer and Cross-Petition of Rosewell E. Messinger.

Now comes the defendant, Peter Anderson, and demurs to the answer and cross-petition of the defendant, Rosewell E. Messinger, on the following grounds:

(1) There is a misjoinder of parties defendant in this action. This defendant is the owner of the premises described in plaintiff's petition in fee simple and his title to said premises cannot be determined in this action.

(2) Several causes of action are improperly joined. Plaintiff seeks to foreclose a mortgage executed by Messinger and wife only, and at the same time seeks to bar this defendant of his legal title to said property.

(3) Separate causes of action against several defendants are improperly joined.

The plaintiff has joined with the maker of a mortgage certain tenants occupying the premises and also this defendant, who is the owner of the premises on which said mortgage was executed, and this defendant did not join in the execution of said mortgage.

(4) Plaintiff's petition does not state facts sufficient to constitute a cause of action against this defendant.

(5) This defendant specially demurs to the third sub-division of said answer and cross-petition, on the following grounds: The allegations contained in said sub-division of said answer and cross-petition cause a misjoinder of parties defendant. Said defendant,

Messenger, in said pleading attempts to determine the right of this defendant to the property described in plaintiff's petition and no other defendants are interested in any way in the controversy between this defendant and said Messenger and this defendant cannot be required to litigate any person involved between him and the said Messenger in this action.

(6) This defendant specially demurs to the third sub-division of said answer and cross-petition, in that several causes of action are improperly joined therein. Said defendant attempts in said pleading to quiet his alleged title to the premises in question against the rights of this defendant in said premises.

(7) This defendant specially demurs to the third sub-division of said answer and cross-petition, for the reason that separate causes of action against several defendants are improperly joined therein.

168 (8) This defendant specially demurs to the third sub-division of said answer and cross-petition, for the reason that the same does not state facts sufficient to constitute a cause of action against this defendant.

PETER ANDERSON,
By RHEA P. CARY AND
C. A. THATCHER,
His Attorneys.

Appearing at pages 42-43 of said record.

On the 13th day of April, 1907, being the twelfth day of the April term, 1907, an order in said cause was made, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

55794.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
PETER ANDERSON et al.

Nos. 145, 146, 147.

This day duly came on for hearing the separate demurrers heretofore filed herein by the defendant, Peter Anderson, to the petition of the plaintiff, United States Mortgage & Trust Company, and to the answer and cross-petition of the defendant and cross-petitioner, Emily O. Butler, and to the answer and cross-petition of the defendant and cross-petitioner, Rosewell E. Messinger, and said demurrers having been argued by counsel for each of said parties, were each duly submitted; and the court, being fully advised in the premises, upon consideration overrules each of said demurrers, to which ruling the defendant, Peter Anderson, by his counsel, then and there duly separately excepted.

And thereupon, on motion therefor, the defendant, Peter Anderson, was duly granted leave to file answer herein by April 27, 1907, except to cross-petition of the defendant, Rosewell E. Messinger.

And thereupon, on motion therefor, the defendant and cross-petitioner, Rosewell E. Messinger, was duly granted leave to file an amended and supplemental answer and cross-petition herein on or before April 23, 1907.

Appearing at page 45 of said record.

On the 27th day of April, 1907, defendant, Peter Anderson, by his attorneys, filed in said court an answer to plaintiff's petition in the above entitled cause, which answer is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

169 UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al., Defendants.

Answer of Peter Anderson to Plaintiff's Petition.

The defendant, Peter Anderson, for answer to the petition filed herein, reserving to himself all proper exceptions to the form of this action, and objecting to and protesting against the form of action and jurisdiction of this court over his person, and over the subject matter, and particularly objecting to and protesting against the right of this court to pass upon and determine in this foreclosure proceeding, his title to the property described in the petition of the plaintiff herein, says:

He admits that the plaintiff is a corporation duly incorporated and organized under the laws of the state of New York. He admits that on November 1, 1897, the defendant Rosewell E. Messinger made and delivered to the plaintiff his promissory note as alleged in plaintiff's petition.

He admits that plaintiff is the owner and holder thereof, and that interest is due thereon from May 1, 1906, at the rate of five per cent (5) per annum.

He admits that to secure the payment of said note, said defendant, Rosewell E. Messinger, executed and delivered to the plaintiff a certain paper purporting to be a mortgage deed, purporting to convey to the plaintiff the real estate described in plaintiff's second cause of action.

He admits that the defendant Estelle P. Messinger joined in said alleged mortgage deed.

Said defendant avers that neither the said Rosewell E. Messinger nor the said Estelle P. Messinger at that time or since had, or now has any right, title or interest in and to said premises, except a life estate which terminated September, 1902, and avers that said alleged mrtgage deed was and is of no force or validity as against this defendant.

This defendant admits that said alleged mortgage deed was conditioned as alleged in said petition.

This defendant admits that said Rosewell E. Messinger failed to

pay taxes due on said premises which became due in the month of June, 1906, and that the same became delinquent, and admits that the said alleged mortgage deed was filed and recorded as averred in plaintiff's petition.

This defendant admits that he claims to be the owner in fee simple of said premises, and avers the fact to be that he is such owner; he denies that the defendant Emily O. Butler claims any interest in said premises, as mortgagee, which is adverse or hostile to
170 the claim of the plaintiff, but avers the fact to be that the said Emily O. Butler claims an interest as mortgagee, subservient and secondary to the plaintiff and in no sense hostile or adverse to it.

This defendant admits that the thirty defendants, whose names are set out in the plaintiff's second cause of action, claim an interest in said premises as lessees, but denies that the same is adverse or hostile to the claims of the plaintiff.

For a further defence to this action, this defendant says that the plaintiff is not a foreign corporation exempt from the appointment and maintenance of an agent or person in the state of Ohio, on whom service of summons may be had, and that plaintiff has failed to appoint and maintain such agent or person in this state. That, by reason thereof, the plaintiff, at the time of and since the commencement of this action, was and has been without capacity or authority to commence and maintain the same; that the plaintiff, at the time of, and since the commencement of this action was, and has been doing business in the state of Ohio, in violation of the laws of said state; and that the plaintiff has failed to pay the taxes dues and fees payable to the state of Ohio as required by law.

For further answer to the plaintiff's petition this defendant says that he has the legal title to, and is the owner in fee simple and entitled to the immediate possession of the real estate described in plaintiff's second cause of action; that the defendant, Rosewell E. Messinger, at the time of the execution of the alleged mortgage deed mentioned in plaintiff's second cause of action, was not the owner of said premises, and had no title thereto, except the life estate hereinbefore set out and shown nor right to encumber the same.

This defendant further avers that said alleged mortgage deed is ineffectual and void as to this defendant and that the same does not in any wise affect this defendant or his title.

For further answer to the plaintiff's said petition, this defendant avers that defendant, Rosewell E. Messinger, on the — day of September, 1906, borrowed from the defendant Emily O. Butler, the sum of five thousand dollars ($5,000.00) and executed and delivered to her his certain promissory note as evidence thereof; that in order to secure the payment of said note, the said Rosewell E. Messinger executed and delivered to the said Emily O. Butler a paper purporting to be a mortgage deed upon the premises involved in this action; that the intent and purpose of said defendant Rosewell E. Messinger in borrowing the said sum from the said defendant Emily O. Butler was to pay the interest then due upon the alleged
171 mortgage set out in plaintiff's petition, and another alleged mortgage held by the plaintiff and executed and delivered to

it by said defendant Messinger, and also to pay the taxes which the said defendant Messinger had permitted to become delinquent upon said premises.

This defendant further avers that the said defendant, Rosewell E. Messinger entered into a conspiracy with the said plaintiff, for the purpose of depriving this defendant of the right to try, as between him and the said defendant, Rosewell E. Messinger, the question of the superiority of title to the premises involved herein, in the Circuit Court of the United States for the Northern District of Ohio, Western Division, in which court this defendant had theretofore brought an action in ejectment against the said defendant Rosewell E. Messinger, (wherein he averred that he was the owner of the property involved herein, and that the said defendant Rosewell E. Messinger had no title thereto) and in which court a trial had been had resulting in a judgment for the said defendant Rosewell E. Messinger, which judgment had been reversed by the Circuit Court of Appeals of the United States for the 6th Circuit and the case remanded for a new trial. Said case was again tried in the said Circuit Court of the United States in the Northern District of Ohio, Western Division, and resulted in a judgment for the defendant Rosewell E. Messinger in December, 1906, and thereupon, on to-wit: March 20, 1907, this defendant sued out and obtained a writ of error to remove said case to the Circuit Court of Appeals of the United States for the Sixth Circuit, where the same is now pending undetermined. In said action, said defendant, Rosewell E. Messinger, appeared and made answer thereto and claimed to be the owner of said premises.

The said Emily O. Butler employed counsel to appear in her behalf in said action, and said counsel did so appear and defend. Said Emily O. Butler was at that time, and now is, the sole heir at law of the said Charles Butler, deceased, who theretofore had attempted to convey by warranty deed the property involved therein and herein to the predecessor in title of the said Rosewell E. Messinger. In the opinion of the said Circuit Court of Appeals, this defendant was adjudged to have acquired, by way of remainder, the title to the premises involved herein under the will of his grandfather, Henry Anderson, deceased, and that the said defendant Rosewell E. Messinger, had no title thereto. For the purpose of defeating the jurisdiction of the said Circuit Court of the United States, and of affording to the said defendant, Rosewell E. Messinger, what was

172 supposed to be an opportunity to relitigate and re-try in this court the questions involved in the said Circuit Court of the United States, the said defendant Rosewell E. Messinger and the said plaintiff entered into a collusive arrangement and conspiracy whereby the said defendant, Rosewell E. Messinger, failed to pay the taxes due upon the property involved herein, and failed to pay the interest due upon the notes secured by said alleged mortgages executed by him to the plaintiff; that he was at said time amply able to pay the same out of the rents and income from the property involved herein, and from the money so borrowed from the said defendant Emily O. Butler. That as a part of the said conspiracy, the plain-

tiff commenced this action against this defendant, the said defendants Emily O. Butler and Rosewell E. Messinger and others.

This defendant further says that in said cause of Anderson vs. Messinger the said Circuit Court of the United States for the Northern District of Ohio, Western Division, and the said Circuit Court of Appeals of the United States for the Sixth Circuit have acquired and exercised full, complete and perfect jurisdiction over the parties thereto (consisting of this defendant and the said Rosewell E. Messinger) and over the subject matter thereof (consisting of the same subject matter as of this action) and the right to try and determine as beween this defendant and the said defendant, Rosewell E. Messinger, the question of superiority of the title to said premises involved therein, and herein. That neither of said courts has surrendered or lost jurisdiction either of said parties or of said subject matter, and that the same is now, and has been since the beginning of said action full and complete.

For a further defense, this defendant says that the plaintiff's bill ought to be dismissed and is without equity for the reason that this defendant Peter Anderson has heretofore offered to the plaintiff to buy from it the mortgage sought to be foreclosed herein, paying him or paying it therefor its full face value with interest to date and taxes paid by the plaintiff, if any, and the costs of foreclosure proceedings, upon condition that the plaintiff, the United States Mortgage & Trust Company, assign to him said mortgage and notes, which offer has been declined.

This defendant denies all the allegations in said petition contained which are not herein admitted to be true.

173 Wherefore, this defendant prays that this action be dismissed as to him, and that he have and recover his costs.

C. A. THATCHER,
C. H. TRIMBLE,
RHEA P. CARY,
Attorneys for Peter Anderson.

STATE OF NEW YORK,
County of New York, ss:

Rhea P. Cary, being duly sworn says, that defendant Peter Anderson is a non-resident of and now absent from the state of Ohio, and that affiant is one of his attorneys in this action; that the allegations contained in the foregoing answer are true, as he verily believes.

RHEA P. CARY.

Subscribed and sworn to before me this 25th day of April, 1907.

[SEAL.] FLORENCE ATEN IVES,
Notary Public.

Appearing at pages 57-62 of said record.

On the 4th day of May, 1907, defendant, Peter Anderson, by his attorneys, filed in said court an amendment to his answer in

the above entitled cause which amendment is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al., Defendants.

Now comes the defendant, Peter Anderson, and by leave of the court first had and obtained, files this his amendment to his original answer to the petition of the plaintiff filed herein, and says:

That the plaintiff, at the time of and since the commencement of this action, was and is a foreign stock corporation organized under the laws of the state of New York and doing business in the state of Ohio, but is not a banking corporation nor such a foreign corporation as is exempt from the appointment and maintenance of an agent or person in the state of Ohio on whom service of summons may be had, as provided by section 1485*d* of the Revised Statutes of Ohio; that plaintiff has failed to appoint and maintain such agent or person in this state, that, by reason thereof, the plaintiff at the time of and since the commencement of this action, was and has been without capacity or authority to commence and maintain the same; that the plaintiff has at all times failed and neglected to make the report in writing to the secretary of state, annually, as provided by the act of April 11, 1902, of the general assembly of Ohio, and has failed to pay the fees therein
174 provided and the taxes therein assessed; and that plaintiff has, therefore been and is now doing business in Ohio in violation of the laws of said state.

That the subject matter of this action is included in that of the case of Peter Anderson vs. Rosewell E. Messinger, now pending in the Circuit Court of Appeals of the United States for the Sixth Circuit.

PETER ANDERSON,
By C. A. THATCHER,
C. H. TRIMBLE,
R. P. CARY,
His Attorneys.

STATE OF OHIO,
County of Lucas, ss:

Rhea P. Cary, being duly sworn, says that the defendant Peter Anderson is a non-resident of and now absent from the state of Ohio; that affiant is one of the attorneys in this action; that the allegations contained in the foregoing amendment are true as he verily believes.

RHEA P. CARY.

Subscribed and sworn to before me this May 4, 1907.

[SEAL.] E. E. BREED,
Deputy Clerk of Courts,
Lucas County, Ohio.

Appearing at pages 75-76 of said record.

On the 9th day of May, 1907, there was filed in said court a reply in the above entitled cause which reply is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
against
PETER ANDERSON and others, Defendants.

Reply.

Now comes the plaintiff, United States Mortgage & Trust Company, and for reply to the answer of the defendant, Peter Anderson, and to the amendment to said answer, denies the averment in said answer that said Rosewell E. Messinger had no title nor interest in the premises described in the petition and denies that said mortagage deed is of no validity, and denies that the defendant, Peter Anderson, has the legal title to said premises and denies that he is the owner of said premises, and denies that he is entitled to the immediate possession thereof.

The plaintiff further denies that the defendant Messinger ever entered into any conspiracy with the plaintiff for any purpose whatever, and denies that it entered into any collusive arrangement with any person whatever for any purpose whatever.

Plaintiff alleges that it was not a party to the case of Anderson vs. Messinger in the Circuit Court of the United States for
175 the Northern District of Ohio, Western Division, nor in the Circuit Court of Appeals of the United States for the Sixth Circuit.

The plaintiff denies that the defendant, Peter Anderson, ever offered to buy from plaintiff the mortgage sought to be foreclosed herein, and denies that any such offer has been declined by it.

Plaintiff further says that it is both a banking corporation and an investment company and is exempt from all the provisions of Section 1185*l* of the Revised Statutes of Ohio.

Plaintiff further says that it has designated Morison R. Waite of Cincinnati, Hamilton county, Ohio, as the person upon whom process against it may be served in the state of Ohio.

Plaintiff denies that it is doing business in Ohio in violence of the laws of said state.

Plaintiff denies that the subject matter of this action or any part thereof is included in that of the case of Peter Anderson vs. Rose-

well E. Messinger, now pending in the Circuit Court of Appeals of the United States for the Sixth Circuit.

B. A. HAYES,
Attorney for Plaintiff.

STATE OF OHIO,
Lucas County, ss:

Birchard A. Hayes, being first duly sworn, says that he is the attorney for the plaintiff above named, that said plaintiff is a corporation, for which reason affiant makes this affidavit, that the statements in the foregoing reply are true, as he believes.

BIRCHARD A. HAYES.

Sworn to before me and subscribed in my presence this 8th day of May, 1907.

[SEAL.] STEPHEN BROPHY,
Notary Public, Lucas County, Ohio.

Appearing at pages 84-85 of said record.

On the 27th day of April, 1907, defendant, Peter Anderson by his attorneys filed in said court an answer to cross-petition of Emily O. Butler in the above entitled cause, which answer is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al., Defendants.

176 *Answer of Peter Anderson to Cross-petition of Emily O. Butler.*

Said defendant, Peter Anderson, reserving all proper exceptions to the form of this action, and objecting and protesting against the right and jurisdiction of this court to try and determine his title in this foreclosure action, says:

He denies that he has no title to the property involved herein, but avers the fact to be that he is the owner in fee simple thereof, and entitled to the immediate use and possession of the same.

He admits that the defendant Rosewell E. Messenger executed and delivered to the cross-petitioner Emily O. Butler a certain paper purporting to be a mortgage upon the property involved herein, and that the same was given to secure the sum of five thousand dollars ($5,000) which had theretofore been borrowed by him from the said cross-petitioner Emily O. Butler.

He denies that the said alleged mortgage is of any binding force or effect whatever as against him, and avers that at the time of its execution the said Rosewell E. Messenger had no title in and to the premises purporting to be conveyed.

This defendant further says that in December, 1904, he instituted in the Circuit Court of the United States for the Northern District of Ohio, Western Division, his action of ejectment against the defendant, Rosewell E. Messenger, wherein he averred that he was the owner of and entitled to the possession of the premises involved herein; that in said action the cross-petitioner Emily O. Butler appeared by counsel and defended, that the trial in said court resulted in a judgment against this defendant, who thereupon moved the same to the Circuit Court of Appeals of the United States, Sixth Circuit, where the judgment of said Circuit Court was reversed, and the case remanded for a new trial; (all of which occurred prior to the execution of said alleged mortgage) that in December, 1906, said case was again tried in the Circuit Court of the United States and resulted in a judgment against this answering defendant who thereupon again removed same to the said Circuit Court of Appeals where the same is now pending undetermined; that in all of the proceedings in said case, the said cross-petitioner Emily O. Butler has appeared by counsel and participated; that she is the only heir at law of Charles Butler, deceased, who had theretofore attempted to convey by warranty deed the premises involved herein; and in said Federal Court case, to the
177 predecessor in title of the said defendant Rosewell E. Messenger.

This defendant further says that the avowed purpose of the loan of five thousand dollars ($5,000) so obtained by said Messenger from the said cross-petitioner Emily O. Butler was the payment of taxes due upon the property involved herein, and of the interest due upon the alleged mortgage executed to the plaintiff herein; that notwithstanding the said avowal of the purpose of said loan, said defendant Rosewell E. Messenger entered into a conspiracy and collusive arrangement with the said plaintiff, whereby the said Rosewell E. Messenger failed to pay said tax and interest, and the plaintiff instituted this action.

This defendant further says that said arrangement and conspiracy was formed for the purpose of attempting to deprive this defendant of the right to have determined in said Federal Courts the questions of superiority of title as between him and the said defendant Rosewell E. Messenger, and to divest said Federal Courts of jurisdiction over said questions; that in said Federal Court proceeding the subject matter thereof was indentical with that of this action.

This defendant denies all allegations in the cross-petition of the said Emily O. Butler contained which are not herein admitted to be true.

Wherefore this defendant prays that such cross-petition be dismissed as to him, and that he have and recover his costs.

C. A. THATCHER,
C. H. TRIMBLE,
RHEA P. CARY,
Attorneys for Peter Anderson.

STATE OF NEW YORK,
County of New York, ss:

Rhea P. Cary, being duly sworn says that defendant, Peter Anderson, is a non-resident of and now absent from the state of Ohio, and that affiant is one of his attorneys in this action; that the allegations contained in the foregoing answer are true, he verily believes.

RHEA P. CARY.

Subscribed and sworn to before me this 25th day of April, 1907.

[SEAL.] FLORENCE ATEN IVES,
Notary Public, No. 9, Kings County.

Certificate filed in New York County.

Appearing at pages 62-64 of said record.

178 On the 10th day of May, 1907, there was filed in said court a reply in the above entitled cause which reply is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

No. 55794.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al., Defendants.

Reply to Answer of Peter Anderson to the Cross-petition of Emily O. Butler.

The defendant Emily O. Butler for reply to the answer of Peter Anderson, to her cross-petition herein says:

1. She denies the averment of said Anderson that he is the owner in fee simple of the property involved herein, and entitled to the immediate use and possession of the same.

2. She denies the allegations of said Anderson that the mortgage given to her by said Rosewell E. Messenger for five thousand ($5,000) dollars is of no binding force or effect as against said Anderson.

3. She denies the statement in said answer that at the time of the execution of the mortgage referred to in her cross-petition, the said Rosewell E. Messenger had no title in and to the premises purporting to be conveyed by his said mortgage, and avers he then had and ever since has held the full fee simple title to said premises and that said Peter Anderson as averred in her cross-petition, has not now and never has had any right or title or interest therein.

4. She denies that she appeared and defended by counsel in the suit referred to in the answer of said Anderson as having been

brought by him in December, 1904, in the Circuit Court of the United States for the Northern District of Ohio, Western Division, or in any of the subsequent proceedings in said case, as alleged in said answer.

5. She denies that the avowed purpose of the loan of five thousand ($5,000) dollars, obtained by said Messenger from her, was the payment of taxes due upon the property involved herein, and the interest due upon the mortgage executed by said Messenger to the plaintiff herein.

6. She denies that said Rosewell E. Messenger entered into any conspiracy and collusive arrangement with the said plaintiff whereby the said Rosewell E. Messenger failed to pay said taxes and interest.

179 7. She denies that any arrangement and conspiracy was formed for the purpose of attempting to deprive the defendant, Anderson, of any right to have determined in said Federal Court the questions of alleged superiority of title, as between him and the said defendant, Rosewell E. Messenger, and to divest said Federal Court of jurisdiction over said questions, as alleged in said answer.

8. She denies that in said Federal Court proceedings the subject matter thereof was identical with that of this action.

9. She further denies any and all allegations in said answer inconsistent with her said answer and cross-petition.

She further avers that on May 6, 1907, she duly obtained a judgment against the defendant, Rosewell E. Messenger, on the first cause of action in her said cross-petition against him and on that day caused an execution thereon to be issued by the clerk of this court directed to the sheriff of Lucas county, Ohio, commanding him to levy same upon the property of said defendant Messenger, and said execution was on that day, by said sheriff, for want of goods and chattels, duly levied upon all the property covered by her said mortgage, being the same property described in the petition herein, (together with other property) and said sheriff on the same day duly made his return of such levy to this court, and filed the same with the clerk of this court.

Wherefore, this defendant except as to her prayer for a personal judgment as continued in her said cross-petition asks that an account may be taken of how much there is now due here on the judgment above referred to; and in all other respects reiterates the prayer of said cross-petition, and further prays that said Rosewell E. Messenger may be adjudged the owner in fee simple of said premises subject to the mortgages of the plaintiff and of this answering defendant, and freed from all claims of an estate or interest therein of the defendant Peter Anderson, and for all relief to which upon the facts she may be entitled in law or equity.

O. B. SNIDER,
Attorney for Defendant, Emily O. Butler.

STATE OF OHIO,
Lucas County, ss:

O. B. Snider, being first duly sworn says that he is the attorney of the defendant, Emily O. Butler, in the above entitled action, that said Emily O. Butler is a non-resident of and now absent
180 from said county of Lucas and state of Ohio and that the facts stated in her foregoing reply are true as affiant verily believes.

O. B. SNIDER.

Sworn to before me and subscribed in my presence this 9th day of May, 1907.

[SEAL.] JAS. HARRINGTON BOYD,
Notary Public, Lucas County, Ohio.

Appearing at pp. 86-88 of said record.

On the 6th day of May, 1907, being the 31st day of the April term, 1907, a judgment in said cause was rendered, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

55794.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
PETER ANDERSON et al.

This day this cause duly came on for hearing and thereupon came the plaintiff, United States Mortgage & Trust Company, and defendants, Peter Anderson and Rosewell E. Messinger, and the defendant and cross-petitioner, Emily O. Butler, by their respective attorneys; and thereupon said cause was duly submitted to the court upon the first cause of action contained in the answer and cross-petition of the defendant, Emily O. Butler, and without the intervention of a jury, on consideration whereof, the court finds that the defendant, Rosewell E. Messinger, is indebted to his co-defendant, Emily O. Butler, in the sum of fifty-one hundred, fifty-two and 55/100 ($5,152.55) dollars, with interest from the first day of this term, to-wit: April 1, 1907, on the note for five thousand ($5,000.00) dollars, set up in the first cause of action in the answer and cross-petition herein, filed by said defendant, Emily O. Butler.

It is therefore, considered by the court that the said Emily O. Butler, recover from the said defendant, Rosewell E. Messinger, the said sum of fifty-one hundred, fifty-two and 55/100 ($5,152.55) dollars, with interest from April 1, 1907, and his costs herein expended, taxed at $——, and it is hereby ordered that execution issue accordingly.

Appearing at p. 83 of said record.

On the 13th day of April, 1907, defendant, Rosewell E. Messinger, by his attorneys filed in said court an amended and supplemental answer and cross-petition in the above entitled cause, which answer and cross-petition is in the words and figures as follows, to-wit:

In the Court of Common Pleas, Lucas County, State of Ohio.

181 UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff.

vs.

PETER ANDERSON, ROSEWELL E. MESSINGER; ROSEWELL E. MESSINGER, Trustee for Charles Ruel Messinger; Estelle P. Messinger, Emily O. Butler, Jacob Ramser, Barbara Ramser, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Frasch, Trustee; Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Zawacki, Robert Deitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford, John H. Serrels, The Detroit & Tennessee Realty Company, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Associationn of the Great Lakes, The Naval Reserves, Sick & Accident Association of Toledo, The Hygienic Tooth-pick Company, The Grasser-Brand Brewing Company, The Huebner-Toledo Breweries Company, John Ramser, Emma E. Andres and Frieda Barbara Schneider, Defendants.

Amended and Supplemental Answer and Cross-petition of the Defendant Rosewell E. Messenger.

The defendant, Rosewell E. Messenger, for answer to the petition and by way of amended and supplemental cross-petition herein, says: That he and the defendant, Estelle P. Messenger, his wife, each for some years past has been and each now is a citizen and resident of the state of Ohio; that this answering defendant, prior to and on November 1, 1897, was trustee for Charles Ruell Messenger; that said trusteeship has since been fully settled and determined, that the plaintiff, United States Mortgage & Trust Company, is a corporation duly incorporated, organized and existing under and by virtue of the laws of the state of New York; that the defendant, The Detroit & Tennessee Realty Company, is a corporation, duly incorporated, organized and existing under and by virtue of
182 the laws of the state of Tennessee; that the defendants, The Marine Cooks' and Stewards' Union, The Marine Firemen, Oilers' & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves, and The Hygienic Toothpick Company, respectively, are co-partnerships formed for the purpose of and doing business in the state of Ohio; that the defendants, the Sick & Accident Association of Toledo, The Grasser-Brand Brewing Company and The Huebner-Toledo Breweries Company are each corporations duly incorporated, organized and existing under and by virtue of

the laws of the state of Ohio; that for some years past, the defendant, Emily O. Butler, has been and now is a citizen and resident of the state of New York; and that for some years past the following defendants, viz: Jacob Ramser, Barbara Ramser, John Ramser, Emma E. Andres, Frieda Barbara Schneider, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdell, William J. Frasch, trustee, Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford and John H. Serrels have been and now are citizens and residents of the state of Ohio.

First Defense.

I. For answer to the first cause of action set forth in the petition herein, this answering defendant, Rosewell E. Messenger, admits that on November 1, 1897, he individually and as trustee for said Charles Ruell Messenger, made and delivered to the plaintiff, United States Mortgage & Trust Company, a promissory note of said date for forty-five thousand dollars ($45,000), a copy of which is set forth in said first cause of action; that the interest has been paid on said note to May 1, 1906; that there are no endorsements thereon; that said plaintiff, United States Mortgage & Trust Company, is the owner and holder thereof; but this answering defendant denies that the principal amount of said note has become due and payable.

Second Defense.

II. For answer to the second cause of action set forth in the petition herein, this answering defendant, Rosewell E. Messenger, adopts and makes part thereof as fully as though herein repeated, each and all of the foregoing allegations and statements and further says that the note described in said second cause of action is the same obligation set forth and described in the first cause of action in said petition. This answering defendant admits the execution and de-

183 livery by him, individually and as trustee for said Charles Ruell Messenger, of the mortgage described in said second cause of action; that the terms and conditions of said mortgage were and are as alleged by plaintiff in said second cause of action; that said mortgage was duly recorded as alleged; and that the taxes and assessments on said premises which became due and payable June 20, 1906, and subsequent thereto, have not been paid and are delinquent; but this answering defendant demands strict proof from said plaintiff with respect to the amount due and to become due under said mortgage.

This answering defendant further says that the defendant, Peter Anderson, claims to be the owner of said mortgaged premises, but denies that said Anderson has any right, claim, interest, or estate of any kind or nature whatsoever in or to said mortgaged premises or any part thereof. This answering defendant admits that the defendant, Emily O. Butler, has an interest in said premises as mort-

gagee thereof, but says that the indebtedness secured by said mortgage is not due and payable.

This answering defendant further says that each of the following defendants, viz: The Detroit & Tennessee Realty Company, The Marine Cooks' and Stewards' Union, The Marine Firemen, Oilers' & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves, Sick & Accident Association of Toledo, The Hygienic Toothpick Company, The Grasser-Brand Brewing Company, The Huebner-Toledo Breweries Company, Jacob Ramser, Barbara Ramser, John Ramser, Emma E. Andres, Frieda Barbara Schneider, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Frasch, trustee, Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford and John H. Serrels have an interest in certain parts of said mortgaged premises under leases respectively entered into between this answering defendant and each of said defendants, and that each of said lessee defendants was for some time prior to, at the commencement of this action, since has been and now is in possession of the respective portions of said premises described in said leases.

First Cause of Action against the Defendant Peter Anderson.

III. For amended and supplemental cross-petition herein, and for cause of action against defendant, Peter Anderson, the defendant and cross-petitioner, Rosewell E. Messenger, says that he adopts and makes part thereof each and all of the foregoing allegations and statements as fully as though same were set forth at length;
184 and further says that since 1896, for a long time prior to and at the time of the commencement of this action he was, has ever since been and now is in the actual possession of the real estate described in said petition; that during all of said time he has been and now is the owner of said premises; that said defendant, Peter Anderson, gives out and publicly states and claims that he is the owner and entitled to the possession of said premises, as remainder under the last will and testament of his grandfather, Henry Anderson, deceased, formerly of Holly Springs, Marshall county, Mississippi, which statement and claim said defendant and cross-petitioner, Rosewell E. Messenger, has at all times disputed and denied and now disputes and denies.

That on or about July 1, 1841, one Charles Butler of New York city, executed in favor of said Henry Anderson, a note of said date of twenty thousand dollars ($20,000) payable one day after date, with interest thereon at six per cent per annum; that on or about September 23, 1841 said Charles Butler, to secure the payment of said note, assigned and transferred to said Henry Anderson a certain note dated May 19, 1838, for twenty-one thousand five hundred dollars ($21,500) executed by one Edward Bissell and payable to the order of said Charles Butler, and also therewith assigned and transferred to said Henry Anderson a certain mortgage securing said Bissell note, said mortgage being executed by said Bissell and his wife

to said Butler upon all of the premises hereinafter and in the petition herein described, which mortgage had previously been duly recorded at pages 267 to 269 in volume 2 of the mortgage records kept in the recorder's office of Lucas county, Ohio; that the said assignment of said mortgage to said Henry Anderson set forth that in fact the same was in trust for the benefit of said Charles Butler and said Henry Anderson received from said Butler, and at all times thereafter held said note and mortgage as collateral security for the payment of Butler's said note to said Henry Anderson and for no other purpose.

That on or about September 9, 1843, said Henry Anderson commenced an action in the Court of Common Pleas of Lucas county, Ohio, in chancery to foreclose said Bissell mortgage, said Henry Anderson being the complainant and said Edward Bissell and wife and others being defendants therein; that such proceedings were thereafter had in said action, that said court at its April term, 1844, entered a decree finding the amount due upon the indebtedness secured by said mortgage and ordering said mortgaged premises sold for the payment thereof; that thereafter an order of sale was
185 issued upon said decree to one Edson Allen, master in chancery of said court, who in pursuance of said decree, on or about September 24, 1844, sold said premises to said Henry Anderson at the price of six thousand, nine hundred and twenty-one dollars ($6,921); that thereafter said master gave said Anderson a deed for said premises based upon said sale and dated November 18, 1844; that said Charles Butler was not a party to said suit and was not bound thereby, and his rights in, to and under said Bissell mortgage remained the same as between him and said Anderson, and were in no manner affected by said action, decree, proceeding, sale and deed, but said Anderson receiving said deed and thereafter held whatever title was thereby conveyed to him in trust as security for the debt of said Butler to said Anderson, and on the same terms and conditions upon which he had previously held said Bissell note and mortgage, and not otherwise; that said deed from said master commissioner to said Henry Anderson was as to said Charles Butler, in fact a mortgage to secure the indebtedness then owing from said Butler to said Anderson and upon the payment of said indebtedness said Butler was entitled to have the title to said property conveyed to him by said Anderson.

That after receiving said deed said Henry Anderson on or about April 3, 1846, departed this life, until the time of his death being a resident of Holly Springs in Marshall county, Mississippi; that he left a will which was afterwards duly probated, allowed and recorded in and by the Probate Court of Marshall county, Mississippi, which court by the constitution and laws of said state, had jurisdiction to probate said will; that Peter Anderson, a brother of said Henry Anderson, Walter Goodman and Peter W. Lucas, all residents of Marshall county, Mississippi, were nominated in and by said will as the executors thereof and trustees of the estate of said Henry Anderson and were afterwards during April, 1846, duly appointed by said court, such executors and trustees, and were fully authorized and empowered to execute the last will and testament

of said Henry Anderson, deceased, and to administer his estate and to adjust, release and discharge all claims in favor thereof; that said Peter Anderson, Walter Goodman and Peter W. Lucas duly entered upon their duties as such executors and trustees, and thereafter continued in the discharge thereof; that whilst said executors and trustees were acting as aforesaid, they demanded payment from said Charles Butler of said $20,000 note with interest thereon from July 1, 1841, and without any deduction therefrom or credit
186 thereon for said property purchased by said Henry Anderson at said master's sale in said foreclosure suit; and that said Charles Butler from time to time thereafter paid to said executors and trustees the full amount of principal and interest due thereon, but said cross-petitioner says he does not know and has not the means of knowing, the exact dates and amounts of said payments, and is, therefore, unable to state same, but that said facts are well known to said defendant, Peter Anderson.

This defendant and cross-petitioner further says that on or about October 1, 1855, Peter Anderson and Walter Goodman, two of said executors and trustees for a full and valuable consideration and in pursuance of authority duly conferred upon them by said last will and testament of said Henry Anderson, deceased, duly executed, acknowledged and delivered to said Charles Butler then living but since deceased, an instrument in writing in due form of law, relinquishing to said Charles Butler, his heirs, and assigns all the interest and title theretofore held by said Henry Anderson in and to all the premises described in the petition herein and other premises, part of which was adjacent thereto, same being described in said deed as follows:

All those certain lots or parcels of land situate, lying and being in the Ni-tula division of the city of Toledo, county of Lucas, state of Ohio, known and designated as lots numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1,008), one thousand and nine (1,009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000), and one thousand and one (1,001), said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street, as said lots were laid out and numbered on the recorded map of said city; together with all and singular, the edifices, buildings, rights, privileges, advantages, hereditaments and appurtenances to the same belonging or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents issues and profits thereof.

And this defendant and cross-petitioner, Rosewell E. Messenger further says that in consideration of the payment of said indebtedness made to said executors, the receipt whereof was duly acknowledged, said executors, by the terms of said instrument in writing fully and forever expressly released and discharged said claim against said Charles Butler and said lien against said prem-
187 ises and confirmed the title thereto unto said Charles Butler, his heirs, and assigns forever.

That said instrument in writing was thereafter duly filed and *recorded* with and was recorded by the recorder of Lucas county, Ohio, at page 110, and following in volume 34 of the public records of deeds of Lucas county, Ohio.

That thereafter on or about April 16, 1860, Peter W. Lucas, one of the executors and trustees of the estate of Henry Anderson, deceased, executed a like instrument in writing relinquishing to said Charles Butler, his heirs, and assigns, all the instruments and title theretofore held by said Henry Anderson in and to all of said premises last above described. Said instrument in writing was duly executed and was thereafter recorded at pages 112 to 114 in volume 34 of the records of deeds of Lucas county, Ohio.

Said defendant and cross-petitioner, Rosewell E. Messenger, further says that after the execution, acknowledgment, delivery and record of said instruments in writing, as aforesaid, cross-petitioner's grandfather, Calvin Bronson, of Toledo, Ohio, then living, but since deceased, and the person under whom said defendant and cross-petitioner Rosewell E. Messenger claims title to said mortgaged and other premises, in good faith in full reliance upon the title theretofore acquired to said premises by said Charles Butler, and for a full and valuable consideration, to-wit $17,500, by said Calvin Bronson, then paid to said Charles Butler, purchased from said Charles Butler, all of the property last hereinbefore specifically described, including the property described in the petition; that thereupon said Charles Butler on or about April 23, 1860, upon and for said consideration paid by said Calvin Bronson, as aforesaid, duly conveyed said premises to said Calvin Bronson, his heirs and assigns forever, by deed duly recorded at page 116 and following in volume 34 of the public records of deeds of Lucas county, Ohio; that thereafter, *on* or about December, 1896, this defendant and cross-petitioner, Rosewell E. Messenger, by regularly executed deeds of conveyance to himself from the other heirs of said Calvin Bronson, deceased, acquired and now owns, holds, and is in possession of all of that portion of said premises and property next hereinbelow described, and has succeeded to, acquired and owns the entire right, title, estate, and interest therein acquired by said Calvin Bronson from said Charles Butler, as aforesaid, viz:

188 All of lot nineteen (19), except the east nineteen (19) feet of the southwest eighty (80) feet, thereof; all of lot twenty (20); all of lot twenty-one (21) and all of lots thirty (30), thirty-one (31), thirty-two (32), one thousand and eight (1,008), and one thousand and nine (1,009), all in the Vistula division of the city of Toledo, Lucas county, and state of Ohio, together with the improvements, privileges, and appurtenances unto said premises belonging.

Said defendant and cross-petitioner, Rosewell E. Messenger, further says that he acquired his title to said premises as aforesaid, for a full and valuable consideration, paid in good faith, and in full reliance upon the title theretofore acquired to said premises by said Calvin Bronson, deceased, and without knowledge or notice of any kind whatsoever of any claim on the part of said defendant, Peter

Anderson, to any estate, title or interest in or to said premises, or any part thereof; that said defendant, Peter Anderson, is the only living *decedent* and the only heir at law of said Henry Anderson, deceased; that said defendant, Peter Anderson, claims and publicly gives out that said instrument in writing from said executors and trustees of said Henry Anderson to said Charles Butler are for some reason unknown to this defendant and cross-petitioner, defective and insufficient to relinquish and release the interest or title which Henry Anderson theretofore had in and to said lands; and this defendant and cross-petitioner says that said defendant, Peter Anderson has no claim, lien, title estate or interest whatsoever in and to said premises, or any part thereof, as heirs or devisee of said Henry Anderson, deceased, or otherwise; and any claim, lien, title, estate or interest in and to said premises or any part thereof, made or asserted by said defendant, Peter Anderson, is by reason of the facts herein set forth, inferior and subordinate to the rights, title and equities therein of this defendant cross-petitioner; that of said instruments in writing of said executors and trustees were or for any reason are insufficient to relinquish and release the title to said premises theretofore held by Henry Anderson, then the title asserted to said premises by said defendant, Peter Anderson, is in trust and for the benefit of this defendant and cross-petitioner; and that same should be conveyed by said Peter Anderson to this defendant and cross-petitioner as the real owner of said premises.

Said defendant and cross-petitioner, Rosewell E. Messenger, further says that on or about December 21, 1904, said defendant,
Peter Anderson, brought an action at law in ejectment
189 against him in the United States Circuit Court, for the Northern District of Ohio, Western Division, known therein as cause No. 1,479, wherein said defendant, Peter Anderson, alleged that he was the owner, in fee simple and sought to recover the possession of said premises described in the petition herein and in this cross-petition, owned by this defendant and cross-petitioner, as aforesaid, and damages for the alleged wrongful detention thereof, from said defendant, Peter Anderson; that said defendant and cross-petitioner, Rosewell E. Messenger, answered in said action denying the claim made and title alleged by said defendant, Peter Anderson, plaintiff herein; that at the December, 1906, term of said court, said action was tried upon said pleadings and upon its merits before the Honorable Robert W. Tayler, judge of said court, and a jury; that said trial resulted in a verdict in favor of this defendant and cross-petitioner, that final judgment was on the 22nd day of December, 1906, duly entered upon said verdict; and that same remains unreversed and in full force and effect; that said defendant, Peter Anderson, and his counsel give out and publicly state that they expect and intend to prosecute proceedings in error to the honorable Circuit Court of Appeals, for the Sixth Circuit, to review said judgment; that under the law and rules of practice, applicable to the Federal courts, this defendant and cross-petitioner, had not the right to allege and prove upon the trial of said action before said United States Circuit Court, and has not the right to present to said Circuit Court

of Appeals the facts set forth in this cross-petition which would have established and which do establish the equitable cause of action and defenses necessary to be alleged and proved in order to fully protect, maintain, establish and assure this defendant and cross-petitioner in his said title to said premises, and with respect to which and by reason whereof, said defendant and cross-petitioner is without adequate remedy at law.

Said defendant and cross-petitioner, Rosewell E. Messenger, asks that said defendant, Peter Anderson, may be required to answer herein and set forth said adverse estate or interest, if any, claimed by him, in and to said mortgaged and other premises, and that the same may be adjudged and decreed to be null and void and of no effect; that said defendant, Peter Anderson may be restrained and enjoined by this court, from proceeding further in said action at law in said Federal courts; and that said action may be stayed until the final adjudication and determination of the above entitled action.

190 Wherefore, said defendant and cross-petitioner, Rosewell E. Messenger prays that an account may be taken of the amount due and to become due plaintiff, United States Mortgage & Trust Company under its said mortgage; that an account may be taken of the amount to become due the defendant, Emily O. Butler, under her said mortgage; that the priority of said liens may be determined; that the pretended claim of said defendant, Peter Anderson, to said mortgaged and adjacent premises hereinbefore described may be declared to be null and void and of no force or effect; that the possession and title of said defendant and cross-petitioner, Rosewell E. Messenger, may be quieted against the same; that if the court finds that said instruments in writing executed by said executors and trustees of the estate of Henry Anderson, deceased, were or are insufficient to relinquish and release to Charles Butler all interest and title theretofore held in said premises by Henry Anderson, and that therefore such interest and title is vested in the defendant, Peter Anderson, that the court decree that such interest and title is so held by said defendant, Peter Anderson, in trust for this defendant, and cross-petitioner and that said defendant, Peter Anderson, be ordered to relinquish and release such interest and title to this defendant and cross-petitioner, by executing and delivering to this defendant and cross-petitioner a proper instrument in writing, in due form of law, within a time to be limited by the court, and in default thereof that the decree of the court shall so operate as to relinquish and release such interest and title to this defendant and cross-petitioner.

Said defendant and cross-petitioner, Rosewell E. Messenger, prays further for all other proper equitable relief.

By KING & TRACY,
Attorneys for the Defendant and Cross-petitioner Rosewell E. Messinger.

STATE OF OHIO,
Lucas County, ss:

Rosewell E. Messinger, being first duly sworn upon his oath says that he is the defendant and cross-petitioner in the above entitled action who files the foregoing amended and supplemental answer and cross-petition, and that the statements therein contained are true as he verily believes.

ROSEWELL E. MESSINGER.

Sworn to before me and subscribed in my presence this 13th day of April, 1907.

[SEAL.] EUGENE H. WINKWORTH,
Notary Public within and for Lucas County, Ohio.

Appearing at pp. 45-56 of said record.

191 On the 4th day of May, 1907, the defendant, Peter Anderson, by his attorneys, filed in said court an answer to the amended and supplemental answer and cross-petition of Rosewell E. Messinger, in the above entitled cause, which answer is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al., Defendants.

Answer of Peter Anderson to Amended and Supplemental Answer and Cross-petition of Rosewell E. Messinger.

The defendant, Peter Anderson for answer to the amended and supplemental answer and cross-petition of Rosewell E. Messenger, reserving all proper exceptions to the form of this action, and objecting to and protesting against the jurisdiction of this court over his person and over the subject matter, and particularly objecting to and protesting against the right of this court to pass upon and determine in this foreclosure proceeding, his title to the property described in the petition of the plaintiff herein and in the amended and supplemental answer and cross-petition of the said Rosewell E. Messenger says:

He admits that the plaintiff is a corporation duly incorporated and organized under the laws of the state of New York, but he avers that it is a foreign stock corporation doing business in the state of Ohio, but is not a banking corporation nor such a foreign corporation as is exempt from the appointment and maintenance of an agent or person in the state of Ohio, on whom service of summons may be had, as provided by section 148*d* of the revised statutes of Ohio, and avers the plaintiff has failed to appoint and maintain such agent or person in this state. That by reason thereof, the plaintiff

at the time of and since the commencement of this action was and has been without capacity or authority to commence and maintain the same; that the plaintiff at the time of and since the commencement of this action, was and has been doing business in the state of Ohio in violation of the laws of said state; and that it has failed to pay the taxes, dues, and fees payable to the state of Ohio, as required *to* law.

He admits that the said cross-petitioner, Rosewell E. Messenger was in 1896 and for a long time prior thereto and at the time of the commencement of this action, in the possession of the real estate described in the original petition herein; denies that during all or any part of said time the said cross-petitioner has been the
192 owner of said premises; admits that he, this defendant, gives out and publicly states and claims that he is the owner and entitled to the possession of said premises as remainder man under the will of his grandfather.

This defendant admits the execution on July 1, 1841 by Charles Butler to Henry Anderson of the note for twenty thousand dollars mentioned in said amended and supplemental answer and cross-petition, payable and bearing interest as therein stated; admits the assignment and transfer to the said Anderson by said Butler at the time stated of the Bissell note and mortgage referred to and described in said amended and supplemental answer and cross-petition, as well as the record thereof; admits that the said assignment was in trust, but avers that the only declaration of said trust was contained in the following words:

"I hereby assign this mortgage to Henry Anderson on certain trusts as set forth in a deed this day made.

September 23, 1841.

CHARLES BUTLER."

This defendant admits the beginning in September 1843 of the action in the court of Common Pleas of Lucas county, Ohio in chancery, which is mentioned and set forth in said amended and supplemental answer and cross-petition; admits that the said Henry Anderson was the complainant therein and Edward Bissell and wife and others were defendants; admits that a decree was entered at the April term 1844 of said court ordering said property sold; that the same was in fact sold to Henry Anderson at the price of $6,921.00; that the master in chancery of said court duly executed a deed conveying said premises to the said Henry Anderson on November 18, 1844, but denies that Charles Butler was not a party to the said suit and not bound thereby, and denies that whatever rights therein he had theretofore had, remained unaffected by said proceedings sale and deed; denies that the said Henry Anderson thereafter held all title conveyed to him in trust for the said Butler; denies that the deed from said master commissioner to said Anderson was in fact a mortgage as to the said Charles Butler; denies that the said Butler was entitled to have said property conveyed to him.

Said defendant Peter Anderson admits that his grandfather the said Henry Anderson, died on or about April 3, 1846, in Holly

Springs, Mississippi; admits that he left a will which was afterwards duly probated; admits that Peter Anderson, Walter Goodman and Peter W. Lucas, were executors and trustees under said will and qualified and acted as such; admits that the said trustees demanded payment of the indebtedness due the estate of Henry Anderson, deceased, from the said Charles Butler but denies that credit upon such indebtedness was denied the said Butler for the amount of the purchase price of the property purchased by said Henry Anderson at said sale in said foreclosure suit; denies that the said Butler paid to said executors and trustees the full amount of interest and principal of said note, but avers the fact to be that the same is not yet paid in full.

193

This defendant denies that Peter Anderson and Walter Goodman, acting as executors and trustees, conveyed the property involved herein on October 1, 1885, to the said Charles Butler and denies that the said Peter Anderson an- Walter Goodman at any time ever attempted for a full and valuable consideration and in pursuance of any authority conferred upon them to convey said property, and denies that they had any power or authority so to do.

This defendant denies that said indebtedness due from the said Charles Butler to the estate of the said Henry Anderson, deceased, was ever paid in full to the said executors and denies that they ever expressly released and discharged said claim against said Butler.

This defendant admits that on or about April 16, 1860, Peter W. Lucas, who had been one of the executors and trustees under the will of Henry Anderson, deceased, undertook to execute in his supposed capacity as executor, but not in his capacity as trustee, a deed to the said Charles Butler, which was recorded as set out in said amended and supplemental answer and cross-petition.

This defendant admits that Calvin Bronson undertook to purchase the property involved herein from Charles Butler for a consideration of $17,500, and that the said Butler undertook to convey the same to the said Bronson, which alleged conveyance was recorded; that thereafter the said Rosewell E. Messenger attempted to acquire the same by deeds from the other heirs of the said Calvin Bronson, deceased, but denies that he now owns any right, title or interest whatever in said property.

This defendant denies that the said defendant, Rosewell E. Messenger, acquired any title to said premises, except the life estate of this defendant's father which terminated by the latter's death, September 15, 1902; and denies that his attempt to do so was without knowledge or notice of the claim upon the property of this defendant; admits that this defendant is the only living descendant and only heir at law of Henry Anderson, deceased; admits that he claims and publicly gives out that the instrument purporting to be executed by said executors and trustees of said Henry Anderson to said Charles Butler, is defective and insufficient to convey the title which the said Henry Anderson had, but denies that the reason for said claim is unknown to said defendant, Rosewell E. Messenger; denies that this defendant has no claim or interest in and to said property, but avers the fact to be that he is the legal owner

194

thereof and entitled to the immediate possession of the same; denies that his title estate and interest *is* inferior and subordinate to the rights or equities of the said Rosewell E. Messenger and denies that the said Rosewell E. Messenger has any right or equity thereon; denies that the title asserted by this defendant is in trust for the said Rosewell E. Messenger or any other person, and denies that the same should be conveyed by this defendant to said Rosewell E. Messenger.

This defendant admits the bringing by him against the said Rosewell E. Messenger in the United States Circuit Court, for the Northern District of Ohio, Western Division, of the action referred to in said amended and supplemental answer and cross-petition; avers that the same was tried upon its merits in June, 1905, before said Circuit Court, when a judgment was rendered against this answering defendant; avers that thereupon said case was carried to the Circuit Court of Appeals of the United States, for the Sixth Circuit, by writ of error when the judgment of said Circuit Court was reversed and the case remanded for a new trial; that in said action said court adjudged that this defendant was the owner of the property involved therein as remainder man under the will of his deceased grandfather, Henry Anderson, and that the said Rosewell E. Messenger had no title thereto; admits that at the December term, 1906, at said Circuit Court, said case was again tried, resulting in a verdict and judgment for the said Rosewell E. Messenger; avers that proceedings in error to the said Circuit Court of Appeals for the Sixth Circuit have been had and perfected to review said judgment and that said case is now pending in said Circuit Court of Appeals; denies that in said court the said Rosewell E. Messenger is precluded from setting up the alleged equitable defenses interposed by him in his amended and supplemental answer and cross-petition herein, and denies that he is without adequate remedy at law; but avers the fact to be that all of the alleged equitable defenses set up and interposed by the amended and supplemental answer and cross-petition herein, were presented and urged in the United States Court case and were considered and disallowed by the honorable United States Circuit Court of Appeals in said action now pending there.

195 For further answer to the amended and supplemental answer and cross-petition of the said defendant, Rosewell E. Messenger, this defendant avers that the property involved herein was all included in the property in said case of Peter Anderson against Rosewell E. Messenger, now pending in the Circuit Court of Appeals of the United States, for the Sixth Circuit and to that court brought by writ of error from the Circuit Court of the United States, for the Northern District of Ohio, Western Division, except the part of lot 19 of the Vistula division, which is described in the original petition of the plaintiff herein; that in said case of Peter Anderson vs. Rosewell E. Messenger, the said Rosewell E. Messenger made answer and defended the same; that said action was begun December 27, 1904, and nearly two years before the filing of the original petition in this case, and more than two years before the filing herein of the amended and supplemental

answer and cross-petition of the said Rosewell E. Messenger; that the said Circuit Court of the United States and said Circuit Court of Appeals have acquired and exercise full, complete and perfect jurisdiction over the parties thereto and over the subject-matter which parties and which subject-matter include the parties and subject-matter in the action made by the amended and supplemental answer and cross-petition of the said Rosewell E. Messenger, filed herein, against this answering defendant, with the exception hereinbefore stated as to part of lot 19; that neither of said Federal Courts has surrendered or lost jurisdiction of either of said parties or of said subject-matter, and that the same is now and has been ever since the beginning of said actions full and complete. This defendant further shows that the part of lot 19, described in the pleadings herein of the plaintiff and said Rosewell E. Messenger, is involved in the case of Peter Anderson vs. United Realty Company, Rosewell E. Messenger, et al., which was originally brought in this court and here decided against this answering defendant and was thereupon carried by writ of error to the Circuit Court of Lucas county, Ohio, where it again resulted in a judgment against this defendant, from which judgment proceedings are now being had to remove to the Supreme Court of Ohio. This defendant represents that said suit of Anderson vs. United Realty Company, et al., involves the ownership and title to said part of lot 19 above referred to and that in said action full and complete jurisdiction of said property and of this answering defendant and of the
196 defendant, Rosewell E. Messenger, has been heretofore acquired by this court, and by said Circuit Court of Lucas county, Ohio.

This defendant further avers that counsel for the said Rosewell E. Messenger have openly avowed the object and purpose of the amended and supplemental answer and cross-petition filed herein on behalf of the said Rosewell E. Messenger to be the defeat and destruction of any judgment which may be rendered by said Federal Courts in favor of this answering defendant, which claim this defendant avers to be true, and submits to the court that such result would be inequitable, unjust and oppressive and an invasion of the right guaranteed him by the Constitution and laws of the United States of America to have tried and determined in any forum of his own selection which is of competent jurisdiction, the claim of title to the property involved herein.

This defendant avers that the said Rosewell E. Messenger and the plaintiff herein have entered into a collusive arrangement for the purpose of depriving this defendant of the right to try as between himself and the said defendant Rosewell E. Messenger, the questions of the superiority of title to the premises involved herein, in the said Circuit Court of the United States, for the Northern District of Ohio, Western Division, in which the proceedings have been had as hereinbefore set out and shown. This defendant states and shows that the default of the said defendant, Messenger, in the payment of the taxes upon the property involved herein and in the

payment of said interest due upon the mortgages held by said plaintiff, was made premeditatedly and for the purpose of bringing about the institution of foreclosure proceedings by said plaintiff in order that an opportunity might thereby be afforded to the said Rosewell E. Messenger to attempt to again litigate in this court the questions at issue and involved in said Federal Courts. At the time of said default the said defendant, Messenger, was amply able to pay said interest and said taxes out of the income from the property involved herein and out of the money borrowed from the defendant, Emily O. Butler, as hereinbefore set out and shown.

For a further defense to this action this defendant says that he has heretofore offered to the plaintiff herein to buy from it the mortgages sought to be herein foreclosed, paying therefor its full face value with interest to date, and the costs of this proceeding, upon condition that the said plaintiff assigns to this defendant said mortgage and note. This offer was by the plaintiff declined, and it still declines to accept the same, and this defendant charges
197 that said declination was made and is continued solely for the purpose and with the intent of aiding said defendant, Messenger, and in pursuance of the collusive arrangement between said defendant, Messenger, and the plaintiff, whereby it sought to deprive said Federal Courts of the jurisdiction acquired by them as hereinbefore shown.

This defendant denies all the allegations in said petition contained which are not herein admitted to be true.

Wherefore this defendant prays that this action be dismissed as to him and that he have and recover his costs.

PETER ANDERSON,
By C. A. THATCHER,
C. H. TRIMBLE, AND
R. P. CARY,
His Attorneys.

STATE OF OHIO,
Lucas County, ss:

Rhea P. Cary, being duly sworn says that the defendant, Peter Anderson, is a non-resident of and now absent from the state of Ohio; that affiant is one of his attorneys in this action; that the allegations contained in the foregoing answer are true as he verily believes.

RHEA P. CARY.

Subscribed and sworn to before me this the 3rd day of May, 1907.

[SEAL.]

AARON SLAGLE,
Notary Public, Lucas County, Ohio.

Appearing at pp. 68-74 of said record.

On the 11th day of May, 1907, there was filed in said court a reply of Rosewell E. Messenger, in the above entitled cause, which reply is in the words and figures as follows, to-wit:

In the Court of Common Pleas, Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al., Defendants.

Reply.

The defendant and cross-petitioner, Rosewell E. Messenger, for reply to the answer of the defendant, Peter Anderson, to the amended and supplemental answer and cross-petition filed herein by said defendant and cross-petitioner, Rosewell E. Messenger, admits:

That the plaintiff, United States Mortgage & Trust Company, is a stock corporation of the state of New York, doing business in the state of Ohio; but he denies that said company is not a banking corporation; he denies that it is not such a foreign corporation as is exempt from the appointment and maintenance of an agent or person in the state of Ohio, on whom service of summons 198 may be had as provided — section 148 *d* of the Revised Statutes of Ohio; he denies that said plaintiff has failed to appoint and maintain such agent or person in this state; he denies that by reason of said failure said plaintiff, at the time of, and since the commencement of this action, was and has been without capacity or authority to commence and maintain the same, and he denies that said plaintiff, at the time of, and since the commencement of this action, was and has been doing business in the state of Ohio in violation of the laws of said state, and that it has failed to pay the taxes, dues and fees payable to the state of Ohio as required by law.

For further reply to said answer of the defendant Peter Anderson, said defendant and cross-petitioner, Rosewell E. Messenger, denies that the only declaration of the trust concerning said Bissell note and mortgage was contained in the following words:

"I hereby assign this mortgage to Henry Anderson on certain trusts, as set forth in a deed this day made.

September 23, 1841.

CHARLES BUTLER."

Said defendant and cross-petitioner, Rosewell E. Messenger, denies that said $20,000 00 note given by said Charles Butler to said Henry Anderson, has not been paid in full; he denies that the only title he acquired to the premises described in said cross-petition was the life estate of the father of said defendant, Peter Anderson; he denies that said defendant Peter Anderson, is the legal owner of said premises; he denies that said defendant, Peter Anderson, is entitled to the immediate possession thereof; he denies that in said action of Anderson against Messenger, begun December 27, 1904,

in the United States Circuit Court, for the Northern District of Ohio, Western Division, and first tried therein at its June term, 1905, the Circuit Court of Appeals of the United States, for the Sixth Circuit, adjudged that the said defendant, Peter Anderson, was the owner of the property involved in said action as remainderman, under the will of his deceased grandfather, Henry Anderson, although adjudged to be such remainderman, and that said Rosewell E. Messenger had no title thereto, but admits that the first judgment of said Circuit Court was reviewed on writ of error, and by said Circuit Court was reversed and remanded for retrial.

Said defendant and cross-petitioner admits that proceedings in error to said Circuit Court of Appeals have been begun to review the judgment of said United States Circuit Court, rendered in said case in favor of said defendant, Rosewell E. Messenger, at its
199 December term, 1906, but denies that all or any of the equitable defenses set up and interposed by said defendant, Rosewell E. Messenger, in his amended and supplemental answer and cross-petition herein were presented in said United States Court case, and that same were considered and disallowed by said Circuit Court of Appeals in said action.

For further reply herein the defendant and cross-petitioner, Rosewell E. Messenger, admits that the property involved herein is all described in the petition in said case of Anderson against Messenger, brought in said United States Court, except the part of lot nineteen in the Vistula Division of the city of Toledo, Ohio, described in the original petition of the plaintiff herein; and said defendant and cross-petitioner, Rosewell E. Messenger, admits that he filed an answer and defended in said case in said United States Court; but he denies that said Circuit Court of the United States and said Circuit Court of Appeals have acquired and exercised full, complete and perfect jurisdiction over the parties to said action and over the subject-matter therein; and he denies that said parties and said subject-matter include the parties and subject-matter in the action made by the amended and supplemental answer and cross-petition herein filed by said defendant and cross-petitioner, Rosewell E. Messenger, and avers that the only jurisdiction acquired by either of said Federal Courts in said action was at law and not in equity and that said jurisdiction is not as full, complete, and efficient to meet the ends of justice as the jurisdiction of the parties hereto and of said subject-matter acquired by said Court of Common Pleas, of Lucas county, Ohio, herein, and that by reason thereof no conflict of jurisdiction exists between said state court and said Federal Courts, or either of them, with respect to said litigations, or either of them.

For further reply herein, said defendant, and cross-petitioner, Rosewell E. Messenger, denies that his counsel have openly avowed the object and purpose of his amended and supplemental answer and cross-petition, filed herein, in his behalf to be the defeat and destruction of any judgment which may be rendered by said Federal Courts in favor of said defendant, Peter Anderson, and denies that such result would be inequitable, unjust, oppressive, and an invasion of the right guaranteed said defendant, Peter Anderson, by the con-

stitution and laws of the United States of America, to have tried and determined in any form of his own selection, which is of competent jurisdiction, the claim of title asserted by him to the property involved in this suit.

200 Said Rosewell E. Messenger, further denies that he and the plaintiff herein have entered into a collusive arrangement of any kind or sort whatever for the purpose of depriving said defendant, Peter Anderson, of the right to try, as between himself and said defendant, Rosewell E. Messenger, the question of the superiority of title to the premises involved herein in the Circuit Court of the United States, for the Northern District of Ohio, Western Division, and known in said court as the case of Peter Anderson vs. Rosewell E. Messenger.

Said defendant and cross-petitioner, Rosewell E. Messenger, further denies that default in the payment of taxes payable on the property involved herein and the payment of interest due upon the mortgages held by said plaintiff, was made premeditatedly and for the purpose of bringing about the institution of foreclosure suits by said Trust Company in order that an opportunity might thereby be afforded to said defendant and cross-petitioner, Rosewell E. Messenger, to attempt to again litigate in this court, the questions at issue and involved in said Federal Court and he denies that at the time of said default he was amply able to pay said interest and said taxes out of the income from the property involved herein and out of the money borrowed from said defendant, Emily O. Butler.

For further reply herein, said defendant and cross-petitioner, Rosewell E. Messenger, says that he has no knowledge with respect to said alleged offer made by said defendant Peter Anderson, to the plaintiff herein, to buy from it the mortgage sought to be foreclosed herein, or of any of the terms of said offer, except the information furnished him thereof, by the pleadings filed herein by said defendant, Peter Anderson; and for want of knowledge said defendant and cross-petitioner, Rosewell E. Messenger, therefore denies the making of said offer; but if said offer was made by said defendant, Peter Anderson, as alleged, and if said offer was declined by plaintiff, as alleged and is yet declined, said defendant and cross-petitioner denies that said declination was made and is continued solely for the purpose and with the intent of aiding him and in pursuance of any collusive or other arrangement between him and said plaintiff whereby plaintiff and this defendant, or either of them sought to deprive said Federal Courts of their jurisdiction.

For further reply herein, said defendant and cross-petitioner, Rosewell E. Messenger, says that said alleged offer by said defendant, Peter Anderson, to the plaintiff herein to buy from it the mortgage sought to be foreclosed in this suit, was not made in good faith, and alleges that said Peter Anderson at the time of making said

201 offer was not willing and able and possessed of the means to carry out same.

For further reply herein, said defendant and cross-petitioner, Rosewell E. Messenger, denies all the allegations in said answer of the

defendant Peter Anderson to said amended and supplemental answer and cross-petition not hereinabove expressly admitted or denied.

Wherefore said defendant and cross-petitioner, Rosewell E. Messenger prays that relief may be afforded him herein in pursuance of the prayer set forth in his said amended and supplemental answer and cross-petition, and that he may have all proper equitable relief.

By KING & TRACY,
His Attorneys.

STATE OF OHIO,
Lucas County, ss:

Rosewell E. Messenger being first duly sworn upon his oath says that he is the defendant and cross-petitioner who files the foregoing reply, and that the facts stated therein are true as he verily believes.

ROSEWELL E. MESSENGER.

Sworn to before me and subscribed in my presence this 11th day of May, 1907.

[SEAL.]

E. H. CLOSE,
Notary Public, Lucas County, Ohio.

Appearing at pp. 88-94 of said record.

On the 28th of May, 1907, being the 32nd day of the April term, 1907, an order in said cause was made, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

55794.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
PETER ANDERSON, EMILY O. BUTLER, ROSEWELL E. MESSINGER et al.

This 28th day of May, 1907, the above entitled cause duly and regularly came on for hearing, and thereupon came said parties by their respective attorneys and the trial of said cause duly proceeded, testimony, by written stipulation signed by all of said parties, by their attorneys, and other evidence being duly offered by the plaintiff, United States Mortgages & Trust Company, upon the issues joined on the petition herein, and by each of the defendants and cross-petitioners, Emily O. Butler and Rosewell E. Messinger, upon the issues joined on their several cross-petitions herein, said defendant, Peter Anderson, by his attorneys, appearing and taking part in said trial, the defendant, Peter Anderson, by his counsel excepts to all the foregoing.

202 Appearing at p. 120 of said record.

On the 29th day of May, 1907, being the 51st day of the April term, 1907, an order in said cause was made, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

55794.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al.

55795.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
ROSEWELL E. MESSINGER et al.

This day came the parties to the above entitled actions, by their respective attorneys, except the defendants interested in the premises made the subject of said actions as lessees; and thereupon, without prejudice to the rights of said lessee defendants, it is, by and with the consent of all of the other parties to each of said above entitled actions, ordered that said causes be and they are hereby consolidated, and, by like consent, it is further ordered that said causes hereafter proceed under the number and title of said first entitled cause, viz: United States Mortgage & Trust Company, plaintiff, vs. Peter Anderson et al., defendants, known as number 55794 in said court.

Appearing at p. 121 of said record.

Thereupon the defendant further to maintain the issues upon his part, offered in evidence duly certified transcript of the proceedings and final record in the Court of Common Pleas, of Lucas county, Ohio, in cause No. 55795 therein, entitled United States Mortgage & Trust Company, plaintiff, vs. Rosewell E. Messenger, Peter Anderson, et al., defendants, said certified transcript being hereto attached, marked "Exhibit A, and hereby made part of this bill of exceptions; and same being received in evidence, defendant by his counsel read in evidence therefrom as follows:

No. 55795.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
ROSEWELL E. MESSENGER et al.

Pleas Before the Court of Common Pleas, within and for the County of Lucas and State of Ohio, at a Term Thereof Begun and Held at the Court House in the City of Toledo, on Monday the 24th Day of September, in the Year of Our Lord, One Thousand, Nine Hundred and Six.

203 Present: Honorable Jason A. Barker, Honorable Julian H. Tyler, Honorable Lindley W. Morris, Honorable Reynolds R Kinkade, Presiding Judges.

Be it remembered that heretofore, to-wit: on the 25th day of October, 1906, plaintiff by its attorney filed in said court a petition in the above entitled cause, which petition is in words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSINGER, ESTELLE P. MESSENGER, PETER ANDERSON, Emily O. Butler, Jacob Ramser, Barbara Ramser, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Fresch, Trustee; Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford, John H. Serrels, The Detroit & Tennessee Realty Company, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, the Naval Reserves, Sick & Accident Association of Toledo, The Hygienic Toothpick Company, The Grasser-Brand Brewing Company, the Huebner-Toledo Breweries Company, John Ramser, Emma E. Andres and Frieda Babara Schneider, Defendants.

Petition.

The plaintiff, the United States Mortgage & Trust Company, says that it is a corporation duly incorporated and organized under the laws of the state of New York.

That the defendant, The Detroit & Tennessee Realty Company, is a corporation duly incorporated under the laws of the state of Tennessee.

That each of the following named defendants is a corporation duly incorporated and organized under the laws of the state of Ohio, to-wit:

204 The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves, The Sick & Accident Association of Toledo, The Hygienic Toothpick Company, The Grasser-Brand Brewing Company and The Huebner-Toledo Breweries Company.

That the defendant, Peter Anderson, is a citizen and resident of the state of Tennessee; that the defendant, Emily O. Butler, is a citizen and resident of the state of New York; and that each of the other defendants not hereinbefore mentioned, is a citizen and resident of the state of Ohio.

Plaintiff further says for its first cause of action:

That on the 10th day of December, 1903, the defendant, Rosewell E. Messinger, made and delivered to the plaintiff his promissory note of that date, on which there are no credits nor endorsements, and of which the following is a copy:

"On the first day of November, 1908, (without grace) for value received, I promise to pay to the order of the United States Mortgage & Trust Company, a corporation organized under the laws of the state of New York, the principal sum of eighteen thousand dollars and interest thereon from the date hereof until paid at the rate of 5½ per centum, per annum, payable on the first days of May and November, according to the terms of ten annexed coupon notes, executed by me simultaneously herewith, and numbered from one to ten. Said principal sum and interest shall be paid in United States Gold Coin of the present standard of weight and fineness or its equivalent together with the current rate of exchange on the city of New York at Merchants National Bank, Toledo, O., with the privilege of paying $2,000 or less on any interest date by giving sixty days written notice.

This contract is to be construed in all respects and enforced according to the laws of the state of Ohio.

Dated at Toledo, O., December 10, 1903.

ROSEWELL E. MESSINGER.

That the plaintiff is still the owner and holder of said promissory note; that there is due to plaintiff from said defendant, Rosewell E. Messinger, upon said promissory note, the sum of eighteen thousand ($18,000) dollars with interest thereon from May 1, 1906 at five and one-half (5½) per cent. per annum, payable semi-annually on the first days of May and November in each and every year.

Plaintiff furthers says for its second cause of action:

That on the 10th day of December, 1903, the defendant, Rosewell E. Messinger, made and delivered to the plaintiff his
205 promissory note of that date, on which there are no credits nor endorsements, and of which the following is a copy:

"On the first day of November, 1908, (without grace) for value received, I promise to pay to the order of the United States Mortgage & Trust Company, a corporation organized under the laws of the state of New York, the principal sum of eighteen thousand dollars and interest thereon from the date hereof until paid at the rate of 5½ per centum, per annum, payable on the first days of May and November, according to the terms of ten annexed coupon notes, executed by me simultaneously herewith, and numbered from one to ten. Said principal sum and interest shall be paid in United States Gold Coin of the present standard of weight and fineness or its equivalent together with the current rate of exchange on the city of New York at Merchant's National Bank, Toledo, O., with the privilege of paying $2,000 or less on any interest date by giving sixty days written notice.

This contract is to be construed in all respects and enforced according to the laws of the state of Ohio.

Dated at Toledo, O., December 10, 1903.

ROSEWELL E. MESSINGER.

That the plaintiff is still the owner, and holder of said promissory note; that there is due to plaintiff from said defendant, Rosewell E. Messinger, upon said promissory note, the sum of eighteen thousand ($18,000) dollars with interest thereon from May 1, 1906, at five and one-half (5½) per cent. per annum, payable semi-annually on the first days of May and November in each and every year.

That to secure the payment of said promissory note, the said defendant, Rosewell E. Messinger, executed and delivered to the plaintiff his certain mortgage deed and thereby conveyed to the plaintiff, its successors and assigns, the following described real estate situate in Vistula division in the city of Toledo, county of Lucas and state of Ohio, to-wit:

"All that part of lots thirty (30), thirty-one (31), one thousand and eight (1008), and one thousand and nine (1009), which lies southwest of a line parallel with and sixty-four and 99-100 (64.99) feet southwest of the southwest boundary line of Cherry street;

Also all that part of lot 32, which lies southwest of said line parallel with and 64.99 feet southwest of said southwest boundary line of Cherry street; and also all that part of said lot 32, which lies southeast of a line drawn at right angles with Cherry Street from a point 206.40 feet southeast of the southeast line of St. Clair
206 street and northeast of a line parallel with and 64.99 feet southwest of the southwest boundary line of Cherry street;

Also all that part of lot 19, which lies northwest of a line parallel with and 19 feet northwest of the southeast line of said lot 19; and also all that part of said lot 19, which lies southeast of said parallel line and northeast of a line parallel with and 80 feet northeast of the southwest line of said lot 19;

Also the whole of lots 20 and 21."

That the defendant, Estelle P. Messinger, the wife of said Rosewell E. Messinger, joined in said mortgaged deed and thereby conveyed all her right and expectancy of dower in said real estate.

That said mortgage contained in condition in substance, that if the defendant, Rosewell E. Messinger, should pay or cause to be paid, the said promissory note to the plaintiff, its successors or assigns, when the same becomes due, with interest, and should keep and perform all and singular the covenants and agreements in said mortgage contained for mortgagor to keep and perform, then said mortgage should become void, otherwise to be and remain in full force and virtue; that said mortgage contained a further condition in substance, that if failure should be made in the payment of either principal or interest when due, or if failure should be made in the performance of any of the other covenants or agreements in said mortgage contained, the entire debt remaining secured by the mortgage, should at once become due and payable if the holder thereof so elect; that said mortgage contained a covenant that the mortgagor, the defendant, Rosewell E. Messinger, should pay all taxes and assessments levied upon the premises herein described when due and payable according to law, and before they become delinquent.

That said mortgage, defendant as aforesaid, failed to pay the taxes due on said premises and payable in June, 1906, so that the same are now delinquent, whereby the whole sum has become due and said mortgage deed absolute.

That on the 10th day of December, 1903, the said mortgage was delivered to the recorder of said county of Lucas for record and was by him duly recorded on the 17th day of December, 1903 in Volume 279 of records of mortgages of said county, at page 464.

Plaintiff further says that the defendant, Peter Anderson, claims to be the owner in fee simple of said premises; that the defendant Emily O. Butler, claims an interest in said premises as
207 mortgagee, adverse and hostile to the claim of plaintiff; that the defendants, Jacob Ramser, Barbara Ramser, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Frasch, trustee, Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford, John H. Serrels, The Detroit & Tennessee Realty Company, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves, Sick & Accident Association of Toledo, The Hygenic Toothpick Company, The Grasser-Brand Brewing Company, The Huebner-Toledo Breweries Company, John Ramser, Emma E. Andrews and Frieda Barbara Schneider, claim an interest in said premises as lessees, adverse and hostile to the claim of plaintiff; plaintiff therefore asks that they may be required to answer and set forth their respective claims or be forever barred.

Wherefore the plaintiff prays that the court may determine the amount due to it upon said promissory note and render judgment therefor; that said mortgage may be foreclosed; and said premises ordered to be sold and the proceeds applied on said debt; and for all necessary equitable relief.

B. A. HAYES,
Attorney for Plaintiff.

STATE OF OHIO,
Lucas County, ss:

Birchard A. Hayes, being first duly sworn, says that he is the attorney for the plaintiff; that the plaintiff is a corporation, for which reason affiant makes this affidavit; and that the statements in the foregoing petition are true as he believes.

BIRCHARD A. HAYES.

Sworn to before me and subscribed in my presence this 18th day of October, 1906.

GEO. P. HAHN,
[SEAL.] *Notary Public, Lucas County, Ohio.*

Appearing at pp. 1-7 of said record.

Endorsed on said petition and filed therewith was a praecipe for summons in said cause.

Thereupon a summons in said cause was issued by the clerk of said court.

Appearing at pp. 1-9 of said record.

On the 15th day of November 1906, defendant Emily O. Butler by her attorney filed in said court an answer and cross-petition in the above entitled cause which answer and cross-petition is in the words and figures as follows, to-wit:

Common Pleas Court, Lucas County, Ohio.

208 No. 55795.

UNITED STATES MORTGAGE AND TRUST COMPANY
vs.
ROSEWELL E. MESSINGER et al.

Answer and Cross-petition of the Defendant, Emily O. Butler.

The defendant, Emily O. Butler, for answer to the petition of the plaintiff herein, and by way of a cross-petition thereto, for a first cause of action says: That by reason of the facts herein stated, and the further facts set forth in her second cause of action herein, to which reference is hereby made, there is due her from the defendant, Rosewell E. Messinger, upon his promissory note, the sum of five thousand dollars ($5,000) with interest from September 27, 1906, at 6 per cent per annum, payable semi-annually, which she claims, a copy of which note, there being no credits or endorsements thereon, is as follows:

$5,000.00. TOLEDO, OHIO, *September* 27, 1906.

Three (3) years after date I promise to pay to the order of Emily O. Butler five thousand ($5,000.00) and no-100 dollars at the office of Willard Parker Butler, 59 Wall street, New York City. Value received, with interest at six per cent (6 per cent) per annum, payable semi-annually.

No. —. Due 9-27-09.

(Signed) ROSEWELL E. MESSINGER.

This answering defendant further says: for a second cause of action.

That at the time of the execution and delivery of the above described note, and to secure the payment thereof, said defendant, Rosewell E. Messinger, executed and delivered to this answering defendant his certain mortgage deed, dated September 27, 1906, whereby he conveyed to her, in fee simple, the following described real estate, viz:

Lots numbered (20), twenty-one (21) except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof, thirty (30), thirty-one (31), thirty-two (32), one thousand and eight (1,008)

and one thousand and nine (1,009), all in the Vistula Division of the city of Toledo, Lucas county, state of Ohio.

That the above described real estate includes all the property described in the petition except as to the portions of lot nineteen (19) described in the petition and the portion of lot twenty one (21) excepted above together with other property.

That Harriett E. Messinger, the wife of said Rosewell E. Messinger, named in the petition as, and who is the same person as the defendant, Estelle P. Messinger, joined in said mortgage deed and
209 thereby conveyed to this answering defendant all her right, title and interest in said premises, by way of dower or otherwise.

That said conveyance was made subject to the conditions that if the said Rosewell E. Messinger, his heirs or assigns, should well and truly pay the note aforesaid, according to the tenor thereof, to this answering defendant, her heirs or assigns, together with all taxes, assessments and insurance premiums, then the said mortgage deed should be void; otherwise the same should remain in full force and virtue.

And it was further provided in said mortgage deed that if failure be made in payment of either principal, interest, taxes, assessments, or insurance premiums, or any part thereof, when due, and the same should remain in arrears for thirty days, the whole of said pincipal sum should become and be then due, and said mortgagee, her heirs or assigns, should be and were thereby authorized in said case of default to proceed at their option for the collection of the whole amount unpaid thereon.

That the taxes due and payable on said premises have not been paid and the same have remained in arrears for more than thirty days and this answering defendant, under the terms of said mortgage deed now exercises her option to declare that the whole amount of said note is now due and payable.

That no payment either of principal or interest has been made upon said note and that there is now due this answering defendant from said defendant, Rosewell E. Messinger, upon said indebtedness, the sum of five thousand dollars ($5,000) with interest thereon from September 27, 1906, at 6 per cent per annum, payable semi-annually.

That by reason of said mortgage deed this answering defendant has a lien upon said mortgage premises to secure the payment of said note, which lien is next after the lien of the plaintiff herein and the taxes.

That said defendant, Peter Anderson, has no right, title or interest in and to said property.

That said mortgage deed was delivered to the recorder of Lucas county, Ohio, on September 28, 1906, at 3:30 o'clock P. M. for record, and was thereafter duly recorded by him in Volume 328 at page 301 of the records of mortgages of said county.

Wherefore, this answering defendant, asks for a judgment against the defendant, Rosewell E. Messinger, for said sum of five
219 thousand dollars ($5,000) with interest from September 27, 1906, at 6 per cent per annum, payable semi-annually, and

that said mortgage be foreclosed and said premises sold as upon execution to satisfy the amount found to be due this answering defendant, and the costs herein; and for all other and further relief to which in equity she may be entitled.

O. B. SNIDER,
Attorney for Defendant, Emily O. Butler.

STATE OF OHIO,
County of Lucas, ss:

O. B. Snider, being first duly sworn, says he is the attorney for the answering defendant, Emily O. Butler, in the above entitled action that said defendant is a non-resident of and now absent from the state of Ohio, and that the statements made in the foregoing answer are true as affiant verily believes.

O. B. SNIDER.

Sworn to before me and subscribed in my presence this 15th day of November, 1906.

JAS. HARRINGTON BOYD,
[SEAL.] *Notary Public, Lucas County, Ohio.*

Endorsed on said answer and cross-petition and filed therewith was a precipe for summons in said cause.

Thereupon a summons in said cause was issued by the clerk of said court.

Appearing at pp. 14-17 of said record.

On the 19th day of November, 1906, defendant, Rosewell E. Messinger, by his attorneys, filed in said court an answer and cross-petition in the above entitled cause, which answer and cross-petition is in the words and figures as follows, to-wit:

In the Court of Common Pleas, Lucas County, State of Ohio.

211 No. 55795.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,

vs.

ROSEWELL E. MESSINGER, ESTELLE P. MESSINGER, PETER ANDERSON, Emily O. Butler, Jacob Ramser, Barbara Ramser, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Frasch, Trustee; Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford, John H. Serrels, The Detroit & Tennessee Realty Company, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves, Sick & Accident Association of Toledo, The Hygienic Toothpick Company, The Grasser-Brand Brewing Company, The Huebner-Toledo Breweries Company, John Ramser, Emma E. Andres and Frieda Barbara Schneider, Defendants.

Answer and Cross-petition of the Defendant Rosewell E. Messinger.

The defendant, Rosewell E. Messinger, for answer to the petition and by way of cross-petition herein says:

That he and the defendant, Estelle P. Messinger, his wife, each for some years past has been, and each now is a citizen and resident of the state of Ohio; that the plaintiff, United States Mortgage & Trust Company, is a corporation duly incorporated, organized and existing under and by virtue of the laws of the state of New York; that the defendant, The Detroit & Tennessee Realty Company, is a corporation duly incorporated, organized and existing under and by virtue of the laws of the state of Tennessee; that the defendants, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves and The Hygienic Toothpick Company, respectively, are co-partnerships formed for the purpose of and doing business in the state of Ohio; that the defend-

212 ants, the Sick & Accident Association of Toledo, The Grasser-Brand Brewing Company, and The Huebner-Toledo Breweries Company are each corporations duly incorporated, organized and existing under and by virtue of the laws of the state of Ohio; that for some years past, the defendant, Emily O. Butler, has been and now is a citizen and resident of the state of New York; and that for some years past the following defendants, viz: Jacob Ramser, Barbara Ramser, John Ramser, Emma E. Andres, Frieda Barbara Schneider, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Frasch, Trustee, Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catharine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Kluss-

man, Charles E. Stafford and John H. Serrels have been and now are citizens and residents of the state of Ohio.

I. For answer to the first cause of action set forth in the petition herein, this answering defendant, Rosewell E. Messinger, admits that on December 10, 1903, he made and delivered to the plaintiff, United States Mortgage & Trust Company, a promissory note of said date for eighteen thousand dollars ($18,000), a copy of which is set forth in said first cause of action; that the interest has been paid on said note to May 1, 1906, that there are no endorsements thereon; that said plaintiff, United States Mortgage & Trust Company, is the owner and holder thereof; but this answering defendant denies that the principal amount of said note has become due and payable.

II. For answer to the second cause of action set forth in the petition herein, this answering defendant, Rosewell E. Messinger, adopts and makes part hereof as fully as though herein repeated, each and all of the foregoing allegations and statements, and further says that the note described in said second cause of action is the same obligation set forth and described in the first cause of action in said petition. This answering defendant admits the execution and delivery by him of the mortgage described in said second cause of action; that the terms and conditions of said mortgage were and are as alleged by plaintiff in said second cause of action; that said mortgage was duly recorded as alleged; and that the taxes and assessments on said premises which became due and payable June 20, 1906, and subsequent thereto, have not been paid and are delinquent but this answering defendant demands strict proof from said plaintiff with respect to the amount due and to become due under said mortgage.

This answering defendant further says that the defendant, Peter Anderson claims to be the owner of said mortgage premises, but denies that said Anderson has any right, claim, interest or
213 estate of any kind or nature whatsoever in or to said mortgaged premises, or any part thereof. This answering defendant admits that the defendant, Emily O. Butler, has an interest in said premises as mortgagee thereof, but says that the indebtedness secured by said mortgage is not due and payable.

This answering defendant further says that each of the following defendants, viz: The Detroit & Tennessee Realty Company, The Marine Cooks and Stewards' Union, the Marine Fireman, Oilers & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves, Sick & Accident Association of Toledo, The Hygienic Toothpick Company, The Grasser-Brand Brewing Company, The Huebner-Toledo Breweries Company, James Ramser, Barbara Ramser, John Ramser, Emma E. Andres, Frieda Barbara Schneider, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Frasch, Trustee, Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford and John H. Serrels, have an interest in certain parts of said mortgage premises under leases respectively entered into between this answering defendant and each of said defendants

and that each of said lessee defendants was for some time prior to, at the commencement of this action, since and now in possession of the respective portions of said premises described in said leases.

III. For further answer to the petition and by way of cross-petition herein, the defendant and cross-petitioner, Rosewell E. Messinger, says that he adopts and makes part hereof each and all of the foregoing allegations and statements as fully as though same were set forth at length; and further says that since 1896 and for a long time prior to, and at the time of the commencement of this action, he was, has ever since been and now is in the actual possession of the real estate described in said petition; that during all of said time he has been and now is the owner of said premises, that said defendant, Peter Anderson, gives out and publicly states and claims that he is the owner and entitled to the possession of said premises, as remainder man under the last will and testament of his grandfather, Henry Anderson, deceased, which statement and claim said defendant and cross-petitioner, Rosewell E. Messinger, has at all times disputed and denies and now disputes and denies; and further says that on or about October 1, 1855, Peter Anderson and Walter Goodman, the duly authorized qualified and acting executors and trustees under the last will and testament of said Henry Anderson, deceased, grandfather of said defendant,
214 Peter Anderson, for a full and valuable consideration and in pursuance of authority duly conferred upon them by said last will and testament of said Henry Anderson, deceased, duly executed, acknowledged and delivered to Charles Butler then living but since deceased, a warranty deed in due form of law conveying to said Charles Butler, his heirs and assigns, the title to all of the premises described in the petition herein and other premises part of which was adjacent thereto, and described in said deed as follows:

All those certain lots or parcels of land situate, lying and being in the Vistula division of the city of Toledo, county of Lucas, state of Ohio, known and designated as lots numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1,008), one thousand and nine (1009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000), and one thousand and one (1,001) said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street, as said lots were laid out and numbered on the recorded map of said city; together with all and singular the edifices, buildings, rights, privileges, advantages, hereditaments and appurtenances to the same belonging, or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and

That said deed was thereafter duly filed for record with and was recorded by the recorder of Lucas county, Ohio, at page 110 and following in volume 34 of the public records of deeds of Lucas county, Ohio.

Said defendant and cross-petitioner, Rosewell E. Messinger fur-

ther says that after the execution, acknowledgment, delivery and record of said deed, as aforesaid, cross-petitioner's grandfather, Calvin Bronson, of Toledo, Ohio, then living but since deceased, and the person under whom said defendant and cross-petitioner, Rosewell E. Messinger, claims title to said mortgage and other premises, in good faith, in full reliance upon the title theretofore acquired to said premises by said Charles Butler, and for a full and valuable consideration, to-wit: $17,500, by said Calvin Bronson then paid to said Charles Butler, purchased from said Charles Butler all of the property in the second preceding paragraph and in the petition described; that thereupon said Charles Butler on or about April 23, 1860, upon and for said consideration paid by said Calvin Bronson as aforesaid duly conveyed said premises to said Calvin Bronson, his heirs and assigns, forever, by deed duly recorded at page
215 116 and following in volume 34 of the public records of deeds of Lucas county, Ohio; that thereafter, on or about December, 1896, this defendant and cross-petitioner, Rosewell E. Messinger, by regularly executed deeds of conveyance to himself from the other heirs of said Calvin Bronson, deceased, now owns, holds and is in possession of all of that portion of said premises and property next hereinbelow described, and has succeeded to, acquired and owns the entire right, title, estate and interest therein required by said Calvin Bronson from said Charles Butler, as aforesaid, viz:

All of lot nineteen (19), except the south east nineteen (19) feet of the south-west eighty (80) feet thereof; all of lot twenty (20); all of lot twenty-one (21), and all of lots thirty (30), thirty-one (31), thirty-two (32), one thousand and eight (1,008) and one thousand and nine (1,009) all in the Vistula division of the city of Toledo, Lucas county, and state of Ohio, together with the improvements, privileges and appurtenances unto said premises belonging.

Said defendant and cross-petitioner, Rosewell E. Messinger, further says that shortly after said Calvin Bronson acquired title to the mortgage premises described in the petition herein and other premises adjacent thereto, all described in said deed from said Charles Butler, said Calvin Bronson entered into the possession of said premises and constructed large and valuable improvements thereon and during his life time paid all taxes and assessments levied and assessed on said premises.

Said defendant and cross-petitioner, Rosewell E. Messinger further says that he acquired his title to said premises as aforesaid for a full and valuable consideration paid in good faith and in full reliance upon the title theretofore acquired to said premises by said Calvin Bronson, deceased, and without knowledge or notice of any kind whatsoever of any claim on the part of said defendant, Peter Anderson, to any estate, title or interest in or to said premises, or any part thereof.

That since said defendant and cross-petitioner, Rosewell E. Messinger, acquired title to said premises as aforesaid, and fully relying thereon, he has made extensive and valuable improvements upon said premises last above described and that during all of said time

until June 20, 1906, he paid all of the taxes and assessments levied and assessed thereon.

The defendant and cross-petitioner, Rosewell E. Messinger, further says that in a certain action in ejectment heretofore begun in this court by Peter Anderson, as plaintiff against the United
216 Realty Company and this defendant and cross-petitioner and others, as defendants, and known as cause No. 53924 in this court, the claim heretofore, therein, and since made by said defendant, Peter Anderson to be the owner of said premises as remainder man under the will of said Henry Anderson, deceased was, at the January term, 1906, of said court, heard and finally determined and adjudicated as to a part of said premises in favor of this defendant and cross-petitioner Rosewell E. Messinger, and against said defendant, Peter Anderson, which decision remains unreversed and in full force and effect.

Said defendant and cross-petitioner, Rosewell E. Messinger, further says that on or about December 24, 1904, said defendant Peter Anderson brought an action in ejectment against him in the United States Circuit Court for the Northern District of Ohio, Western Division, known therein as cause No. 1479, wherein said defendant, Peter Anderson, seeks to recover the possession of said premises owned by said defendant and cross-petitioner, as aforesaid, and damages for the alleged wrongful detention thereof from said defendant, Peter Anderson; that said defendant and cross-petitioner, Rosewell E. Messinger, has answered in said action denying the claims made by said defendant, Peter Anderson, plaintiff therein; that said action is yet pending in said court and undetermined; that said defendant, Peter Anderson, and his counsel give out and publicly state that they expect and intend to urge said case for trial at the ensuing December term of said court; that under the rules of practice applicable to said United States Circuit Court, said defendant and cross-petitioner, Rosewell E. Messinger, has not the right to allege and prove in said action the facts which establish the equitable defenses necessary to be alleged and proven in order to protect, maintain, establish and assure him in his said title to said premises; and that this defendant and cross-petitioner is without adequate remedy at law herein.

Said defendant and cross-petitioner, Rosewell E. Messinger, asks that said defendant, Peter Anderson, may be required to answer herein and set forth said adverse estate or interest, if any, claimed by him in and to said mortgaged and other premises, and that the same may be adjudged and decreed to be null, void and of no effect; that said defendant Peter Anderson, may be restrained and enjoined by this court from proceeding further in said action at law in said Federal Court, and that said action may be stayed, until the final adjudication and determination of the above-entitled action.

Wherefore, said defendant and cross-petitioner, Rosewell E.
217 Messinger prays that an account may be taken of the amount due and to become due plaintiff, United States Mortgage & Trust Company, under its said mortgage; that an account may be taken of the amount to become due the defendant, Emily O. Butler, under her said mortgage that the priority of said liens may be de-

termined; that the pretended claim of said defendant, Peter Anderson, to said mortgage and adjacent premises next hereinabove described, may be declared to be null and void and of no force or effect; and that the possession and title of said defendant and cross-petitioner, Rosewell E. Messinger, may be quieted against the same.

Said defendant and cross-petitioner, Rosewell E. Messinger prays further for all other proper equitable relief.

By KING & TRACY,
Attorneys for the Defendant and Cross-petitioner, Rosewell E. Messinger.

STATE OF OHIO,
Lucas County, ss:

Rosewell E. Messinger, being first duly sworn, upon his oath says that he is the defendant and cross-petitioner in the above entitled action who files the foregoing answer and cross-petition, and that the statements therein contained are true, as he verily believes.

ROSEWELL E. MESSINGER.

Sworn to before me and subscribed in my presence this 19th day of November, 1906.

[SEAL.] FRANK W. CAUGHLING,
Notary Public within and for Lucas County, Ohio.

Endorsed on said answer and cross-petition and filed therewith was a precipe for summons in said cause.

Thereupon a summons in said cause was issued by the clerk of said court.

Appearing at pages 18-28 of said record.

On the 18th day of March, 1907, being the 60th day of the January term, 1907, an order in said cause was made, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

No. 55795.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
ROSEWELL E. MESSINGER et al.

Upon application to the court defendant Anderson was given leave to answer in ten days.

Appearing at page 42 of said record.

On the 27th day of March, 1907, there was filed in said court a demurrer of Peter Anderson to petition in the above entitled cause, which demurrer is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

218 UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSINGER et al., Defendants.

Demurrer to Petition.

Now comes the defendant Peter Anderson and demurs to the petition of the plaintiff filed herein, on the following grounds:

(1) There is a misjoinder of parties defendant. The defendant is the owner of the premises described in plaintiff's petition in fee simple and his title to said premises cannot be determined in this action.

(2) Several causes of action are improperly joined. Plaintiff seeks to foreclose a mortgage executed by Messenger and wife only, and at the same time to bar this defendant of his legal title to said property.

(3) Separate causes of action against several defendants are improperly joined. The plaintiff has joined with the maker of a mortgage certain tenants occupying the premises and also this defendant who is the owner of the premises on which said mortgage was executed and this defendant did not join in the execution of said mortgage.

(4) Plaintiff's petition does not state facts sufficient to constitute a cause of action against this defendant.

PETER ANDERSON.
By RHEA P. CARY,
C. A. THATCHER,
His Attorneys.

Appearing at pages 44-45 of said record.

On the 27th day of March, 1907, defendant, Peter Anderson, by his attorneys, filed in said court a demurrer to answer and cross-petition of Emily O. Butler, in the above entitled cause, which demurrer is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSINGER et al., Defendants.

Demurrer to the Answer and Cross-petition of Emily O. Butler.

Now comes the defendant Peter Anderson and demurs to the answer and cross-petition of the defendant Emily O. Butler on the following grounds:

(1) There is a misjoinder of parties defendant in this action.

219 (2) Several causes of action are improperly joined in the answer and cross-petition of the said Emily O. Butler.

(3) Separate causes of action against several defendants are improperly joined in the answer and cross-petition of Emily O. Butler. This defendant has no interest in the controversy between the said Emily O. Butler and Rosewell E. Messenger.

(4) The answer and cross-petition of Emily O. Butler and the petition in this case do not state facts sufficient to constitute a cause of action against this defendant.

PETER ANDERSON,
By RHEA P. CARY AND
C. A. THATCHER,
His Attorneys.

Appearing at page 44 of said record.
Appearing at page 47 of said record.

On the 27th day of March, 1907, defendant, Peter Anderson, by his attorneys, filed in said court a demurrer to answer and cross-petition of Rosewell E. Messinger in the above entitled cause, which demurrer is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSINGER et al., Defendants.

Demurrer to Answer and Cross-petition of Rosewell E. Messinger.

Now comes the defendant Peter Anderson and demurs to the answer and cross-petition of the defendant Rosewell E. Messinger on the following grounds:

(1) There is a misjoinder of parties defendant in this action. This defendant is the owner of the premises described in plaintiff's petition in fee simple and his title to said premises can not be determined in this action.

(2) Several causes of action are improperly joined. Plaintiff seeks to foreclose a mortgage executed by Messinger and wife only, and at the same time seeks to bar this defendant of his legal title to said property.

(3) Separate causes of action against several defendants are improperly joined.

The plaintiff has joined with the maker of a mortgage certain tenants occupying the premises and also this defendant, who is the owner of the premises on which said mortgage was executed, and this defendant did not join in the execution of said mortgage.

220 (4) Plaintiff's petition does not state facts sufficient to constitute a cause of action against this defendant.

(5) This defendant specially demurs to the third subdivision of

said answer and cross-petition on the following grounds: The allegations contained in said subdivision of said answer and cross-petition cause a misjoinder of parties defendant. Said defendant Messenger in said pleading attempts to determine the right of this defendant to the property described in plaintiff's petition and no other defendants are interested in any way in the controversy between this defendant and said Messenger and this defendant cannot be required to litigate any question involved between him and the said Messenger in this action.

(6) This defendant specially demurs to the third subdivision of said answer and cross-petition in that several causes of action are improperly joined therein. Said defendant attempts in said pleading to quiet his alleged title to the premises in question against the rights of this defendant in said premises.

(7) This defendant specially demurs to the third subdivision of said answer and cross-petition for the reason that separate causes of action against several defendants are improperly joined therein.

(8) This defendant specially demurs to the third subdivision of said answer and cross-petition for the reason that the same does not state facts sufficient to constitute a cause of action against this defendant.

PETER ANDERSON,
By RHEA P. CARY AND
C. A. THATCHER,
His Attorneys.

Appearing at pages 45-46 of said record.

On the 13th day of April, 1907, being the 12th day of the April term, 1907, an order in said cause was made, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

55795.

Nos. 148, 149 and 150.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
ROSEWELL E. MESSINGER et al.

This day duly came on for hearing the separate demurrer heretofore filed herein by the defendant, Peter Anderson, to the petition of the plaintiff, United States Mortgage & Trust Company, and to the answer and cross-petition of the defendant and cross-petitioner, Emily O. Butler, and to the answer and cross-petition of the defendant and cross-petitioner, Rosewell E. Messinger, and
221 said demurrers having been argued by counsel for each of said parties, were each duly submitted; and the court, being fully advised in the premises, upon consideration overrules each of said demurrers, to which ruling the defendant, Peter Anderson, by his counsel, then and there duly separately excepted.

And thereupon on motion therefor, the defendant, Peter Ander-

son, was duly granted leave to file answer herein by April 27, 1907, except to cross-petition of the defendant, Rosewell E. Messinger.

And thereupon, on motion therefor, the defendant and cross-petitioner, Rosewell E. Messinger, was duly granted leave to file an amended and supplemental answer and cross-petition herein on or before April 23, 1907.

Appearing at page 48 of said record.

On the 27th day of April, 1907, defendant, Peter Anderson, by his attorneys filed in said court an answer to plaintiff's petition in the above entitled cause, which answer is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,

vs.

ROSEWELL E. MESSINGER et al., Defendants.

Answer of Peter Anderson to Plaintiff's Petition.

The defendant, Peter Anderson for answer to the petition filed herein reserving to himself all proper exceptions to the form of this action, and objecting to and protesting — the form of action and jurisdiction of this court over his person, and over the subject matter and particularly objecting to and protesting against the right of this court to pass upon and determine in this foreclosure proceeding his title to the property described in the petition of the plaintiff herein says:

He admits that the plaintiff is a corporation duly incorporated and organized under the laws of the state of New York. He admits that on November 1, 1897, the defendant, Rosewell E. Messenger, made and delivered to the plaintiff his promissory note as alleged in plaintiff's petition.

He admits that plaintiff is the owner and holder thereof, and that interest is due thereon from May 1, 1906, at the rate of five and one-half per cent (5½ per cent) per annum.

He admits that to secure the payment of said note, said defendant, Rosewell E. Messenger, executed and delivered to the plain-
222 tiff; a certain paper purporting to be a mortgage deed and purporting to convey to the plaintiff the real estate described in plaintiff's second cause of action.

He admits that the defendant, Estelle P. Messenger joined in said alleged mortgage deed.

Said defendant avers that neither the said Rosewell E. Messenger nor the said Estelle P. Messenger at that time or since had or now has any right, title or interest in and to said premises, and avers that said alleged mortgage deed was and is of no force or validity.

This defendant admits that said alleged mortgage deed was conditioned as alleged in said petition.

This defendant admits that said Rosewell E. Messenger, failed to pay taxes due on said premises which became due in the month of June 1, 1906, and that the same became delinquent and admits that the said alleged mortgage deed was filed and recorded as averred in plaintiff's petition.

This defendant admits that he claims to be the owner in fee simple of said premises, and avers the fact to be that he is such owner; he denies that the defendant, Emily O. Butler claims any interest in said premises, as mortgagee, which is adverse or hostile to the claim of the plaintiff, but avers the fact to be that the said Emily O. Butler claims an interest as mortgagee, subservient and secondary to the plaintiff and in no sense hostile or adverse to it.

This defendant admits that the thirty defendants, whose names are set out in the plaintiff's second cause of action, claim an interest in said premises as lessees but denies that the same is adverse or hostile to the claim of the plaintiff.

For a further defense to this action this defendant says that the plaintiff is not a foreign corporation exempt from the appointment and maintenance of an agent or person in the state of Ohio, on whom service of summons may be had, and that plaintiff has failed to appoint and maintain such agent or person in this state. That by reason thereof, the plaintiff at the time of and since the commencement of this action, was and has been without capacity or authority to commence and maintain the same; that the plaintiff, at the time of, and since the commencement of this action was, and has been doing business in the state of Ohio in violation of the laws of said state; and that the plaintiff has failed to pay the taxes, dues and fees payable to the state of Ohio as required by law.

For further answer to the plaintiff's petition this defendant says that he has the legal title, to and is the owner in fee simple and entitled to the immediate possession of the real estate de-
223 scribed in plaintiff's second cause of action; that the defendant, Rosewell E. Messenger, at the time of the execution of the alleged mortgage deed mentioned in plaintiff's second cause of action, was not the owner of said premises and had no title thereto, nor right to encumber the same.

This defendant further avers that said alleged mortgage deed is ineffectual and void and that the same does not in any wise effect this defendant or his title.

For further answer to the plaintiff's said petition, this defendant avers that defendant, Rosewell E. Messenger, on the — day of September, 1906, borrowed from the defendant, Emily O. Butler, the sum of five thousand dollars ($5,000) and executed and delivered to her his certain promissory note as evidence thereof; that in order to secure the payment of said note, the said Rosewell E. Messenger executed and delivered to the said Emily O. Butler a paper purporting to be a mortgage deed upon the premises involved in this action; that the intent and purpose of said defendant, Rosewell E. Messenger, in borrowing said sum from the said defendant Emily O. Butler was to pay the interest then due upon the alleged mortgage set out in plaintiff's petition and another alleged mortgage held by the plain-

tiff and executed and delivered to it by said defendant, Messenger, and also to pay the taxes which the said defendant, Messenger, had permitted to become delinquent upon said premises.

This defendant further avers that the said defendant Rosewell E. Messenger, entered into a conspiracy with the said plaintiff, for the purpose of depriving this defendant of the right to try, as between him and the said defendant, Rosewell E. Messenger, the question of the superiority of title to the premises involved herein, in the Circuit Court of the United States for the Northern District of Ohio, Western Division, in which court this defendant had theretofore brought an action in ejectment against the said defendant Rosewell E. Messinger, (wherein he averred that he was the owner of the property involved herein, and that the said defendant Rosewell E. Messinger had no title thereto) and in which court a trial had been — resulting in a judgment for the said defendant Rosewell E. Messenger, which judgment had been reversed by the Circuit Court of Appeals of the United States for the Sixth Circuit, and the case remanded for a new trial, said case was again tried in the said Circuit Court of the United States in the Northern District of Ohio, Western Division, and resulted in a judgment for the defendant Rosewell E. Messenger in December 1906, and thereupon on to-wit March 20, 1907, this defendant sued out and ob-
224 tained a writ of error to remove said case to the Circuit Court of Appeals of the United States for the Sixth Circuit, where the same is now pending undetermined. In said action said defendant, Rosewell E. Messenger appeared and made answer thereto and claimed to be the owner of said premises. The said Emily O. Butler employed counsel to appear in her behalf in said action and said counsel did so appear and defend. Said Emily O. Butler was at that time and now is the sole heir at law of the said Charles Butler, deceased, who theretofore had attempted to convey by warranty deed the property involved therein and herein to the predecessor in title of the said Rosewell E. Messenger. In the opinion of the said Circuit Court of Appeals this defendant was adjudged to have acquired by way of remainder, the title to the premises involved herein under the will of his grandfather Henry Anderson, deceased, and that the said defendant Rosewell E. Messenger, had no title thereto. For the purpose of defeating the jurisdiction of the said Circuit Court of the United States and of affording to the said defendant, Rosewell E. Messenger, what was supposed to be an opportunity to relitigate and retry in this court the questions involved in the said Circuit Court of the United States, the said defendant Rosewell E. Messenger and the said plaintiff entered into a collusive arrangement and conspiracy whereby the said defendant, Rosewell E. Messenger failed to pay the taxes due upon the property involved herein, and failed to pay the interest due upon the notes secured by said alleged mortgages executed by him to the plaintiff, that he was at said time amply able to pay the same out of the rents and incomes from the property involved herein, and from the money so borrowed from the said defendant, Emily O. Butler; that as a part of the said conspiracy the plaintiff commenced this action

against this defendant, the said defendants, Emily O. Butler and Rosewell E. Messenger and others.

This defendant further says that in said cause of Anderson vs. Messenger, the said Circuit Court of the United States for the Northern District of Ohio, Western Division, and the said Circuit Court of Appeals of the United States for the Sixth Circuit have acquired and exercised full, complete, and perfect jurisdiction over the parties thereto (consisting of this defendant and the said Rosewell E. Messenger) and over the subject matter thereof (consisting of the same subject matter as of this action) and the right to try and determine as between this defendant and the said defendant Rosewell E. Messenger, the question of superiority of the title to said premises involved therein and herein. That neither of
225 said courts has surrendered or lost jurisdiction either of said parties or said subject matter, and that the same is now, and has been ever since the beginning of said action full and complete.

For a further defense this defendant says that the plaintiff's bill ought to be dismissed and is without equity for the reason that this defendant Peter Anderson has heretofore offered to the plaintiff to buy from it the mortgage sought to be foreclosed herein, paying him or paying it therefore its full face value with interest to date and taxes paid by the plaintiff, if any and the costs of foreclosure proceedings upon condition that the plaintiff, the United States Mortgage & Trust Company assign to him said mortgage, and notes, which offer has been declined.

This defendant denies all the allegations in said petition contained which are not herein admitted to be true.

Wherefore this defendant prays that this action be dismissed as to him and that he have and recover his costs.

C. A. THATCHER,
C. H. TRIMBLE,
RHEA P. CARY,
Attorneys for Peter Anderson.

STATE OF NEW YORK,
County of New York, ss.

Rhea P. Cary being duly sworn says that defendant, Peter Anderson, is a non-resident of and now absent from the state of Ohio, and that affiant is one of his attorneys in this action; that the allegations contained in the foregoing answer are true, as he verily believes.

RHEA P. CARY.

Subscribed and sworn to before me this 25th day of April, 1907.

FLORENCE ATEN IVES,
Notary Public.

[SEAL.]

Appearing at pp. 60-65 of said record.

On the 4th day of May, 1907, defendant, Peter Anderson, by his attorneys, filed in said court an amendment to his answer in the above entitled cause, which amendment is in the words and figures, to-wit:

465

In the Court of Common Pleas of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSINGER et al., Defendants.

Now comes the defendant, Peter Anderson, and by leave of the court first had and obtained, files this his amendmeent to his original answer to the petition of the plaintiff filed herein, and says:

226 That the plaintiff, at the time of and since the commencement of this action, was and is a foreign stock corporation organized under the laws of the state of New York, and doing business in the state of Ohio, but is not a banking corporation nor such a foreign corporation as is exempt from the appointment and maintenance of an agent or person in the state of Ohio on whom service of summons may be had, as provided by section 1185 of the revised statutes of Ohio; that plaintiff has failed to appoint and maintain such agent or person in this state; that, by reason thereof, the plaintiff at the time of and since the commencement of this action was and has been without capacity or authority to commence and maintain the same; that the plaintiff has at all times failed and neglected to make the report in writing to the secretary of state, annually as provided by the act of April 11, 1902, of the General Assembly of Ohio, and has failed to pay the fees therein provided and the taxes therein assessed; and that plaintiff has, therefore been and is now doing business in Ohio in violation of the laws of said state.

That the subject matter of this action is included in that of the case of Peter Anderson, vs. Rosewell E. Messenger, now pending in the Circuit Court of Appeals of the United States, for the Sixth Circuit, with the single exceptions that herein is involved a part of lot 19 of the Vistula division of the city of Toledo.

That the part of lot 19 described in the petition of the plaintiff herein is involved in the case of Peter Anderson, vs. United Realty Company, et al., which was originally brought in this court and here decided against this defendant (who was the plaintiff therein), and was, thereupon carried, by writ of error, to the Circuit Court of Lucas county, Ohio, where it again resulted in a judgment against this defendant, from which judgment proceedings are now being had to remove the said case to the Supreme Court of Ohio.

That said suit of Anderson vs. United Realty Company, et als., involves the ownership and title to said part of lot 19 hereinbefore referred to, and that in said action full and complete jurisdiction of said property and of this answering defendant, and of the defendant Rosewell E. Messinger has been heretofore acquired by this court and by said Circuit Court of Lucas County, Ohio.

PETER ANDERSON,
By C. A. THATCHER,
C. H. TRIMBLE,
R. P. CARY,
His Attorneys.

STATE OF OHIO,
County of Lucas, ss:

Rhea P. Cary, being duly sworn, says that the defendant Peter Anderson is a non-resident of and now absent from the State
227 of Ohio; that affiant is one of his attorneys in this action; that the allegation contained in the foregoing amendment are true, as he verily believes.

RHEA P. CARY.

Subscribed and sworn to before me this May 4, 1907.

E. E. BREED,

[SEAL.] *Deputy Clerk of Courts, Lucas County, Ohio.*

Appearing at pp. 79-80 of said record.

On the 9th day of May, 1907, there was filed in said court a reply in the above entitled cause which reply is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
against
ROSEWELL E. MESSINGER and Others, Defendants.

Reply.

Now comes the plaintiff, United States Mortgage & Trust Company, and for reply to the answer of the defendant Peter Anderson, and to the amendment to said answer denies the averment in said answer that said Rosewell E. Messenger had no title nor interest in the premises described in the petition and denies that said mortgage deed is of no validity, and denies that the defendant Peter Anderson, is the owner of said premises, and denies that he is entitled to the immediate possession thereof.

The plaintiff further denies that the defendant Messenger ever entered into any conspiracy with the plaintiff for any purpose whatever, and denies that it entered into any collusive arrangement with any person whatever for any purpose whatever.

Plaintiff alleges that it was not a party to the case of Anderson vs. Messenger in the Circuit Court of the United States for the Northern District of Ohio, Western Division nor in the Circuit Court of Appeals of the United States for the Sixth Circuit.

The plaintiff denies that the defendant, Peter Anderson, ever offered to buy from plaintiff the mortgage sought to be foreclosed herein and denies that any such offer has been declined by it.

Plaintiff further says that it is both a banking corporation and an investment company and is exempt from all the provisions of section 148*d* of the Revised Statutes of Ohio.

Plaintiff further says that it has designated Morison R. Waite of

Cincinnati, Hamilton county, Ohio, as the person upon whom process against it may be served in the state of Ohio.

228 Plaintiff denies that it is doing business in Ohio in violation of the laws of said state.

Plaintiff denies that the subject matter of this action or any part thereof is included in that of the case of Peter Anderson vs. Rosewell E. Messinger, now pending in the Circuit Court of Appeals of the United States for the Sixth Circuit.

Plaintiff has no knowledge as to what property is involved in the case of Anderson v. United Realty Co., et al., and therefore denies that any part of said lot 19 is involved in said last mentioned case.

Plaintiff further alleges that it was not a party to the suit of Anderson v. United Realty Co. referred to in the amendment to the answer of said Peter Anderson filed herein.

B. A. HAYES,
Attorney for Plaintiff.

STATE OF OHIO,
Lucas County., ss:

Birchard A. Hayes, being first duly sworn, says that he is the attorney for the plaintiff above named, that said plaintiff is a corporation, for which reason affiant makes this affidavit, that the statements in the foregoing reply are true, as he believes.

BIRCHARD A. HAYES.

Sworn to before me and subscribed in my presence this 8th day of May, 1907.

PAUL J. RAGAN,
[SEAL.] *Notary Public, Lucas County, Ohio.*

Appearing at page- 88-89 of said record.

On the 27th day of April, 1907, defendant Peter Anderson by his attorneys filed in said court an answer to cross-petition of Emily O Butler in the above entitled cause, which answer is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSINGER et al., Defendants.

Answer of Peter Anderson to Cross-Petition of Emily O. Butler.

Said defendant, Peter Anderson, reserving all proper exceptions to the form of this action, and objecting and protesting against the right and jurisdiction of this court to try and determine his title in this foreclosure action, says:

229 He denies that he has no title to the property involved herein, but avers the fact to be that he is the owner in fee

simple thereof, and entitled to the immediate use and possession of the same.

He admits that the defendant Rosewell E. Messenger executed and delivered to the cross petitioner Emily O. Butler a certain paper purporting to be a mortgage upon the property involved herein, and that the same was given to secure the sum of five thousand dollars ($5,000) which had theretofore been borrowed by him from the said cross-petitioner Emily O. Butler.

He denies that the said alleged mortgage is of any binding force or effect whatever as against him, and avers that at the time of its execution the said Rosewell E. Messenger had no title in and to the premises purporting to be conveyed.

This defendant further says that in December, 1904, he instituted in the Circuit Court of the United States for the Northern District of Ohio, Western Division, his action of ejectment against the defendant, Rosewell E. Messenger, wherein he averred that he was the owner of and entitled to the possession of the premises involved herein; that in said action the cross-petitioner Emily O. Butler appeared by counsel and defended, that the trial in said court resulted in a judgment against this defendant, who thereupon moved the same to the Circuit Court of Appeals of the United States, Sixth Circuit, where the judgment of said Circuit Court was reversed, and the case remanded for a new trial; (all of which occurred prior to the execution of said alleged mortgage); that in December, 1906, said case was again tried in the Circuit Court of the United States and resulted in a judgment against this answering defendant who thereupon again removed same to the said Circuit Court of Appeals where the same is now pending undetermined; that in all of the proceedings in said case, the said cross-petitioner Emily O. Butler has appeared by counsel and participated; that she is the only heir at law of Charles Butler, deceased, who had theretofore attempted to convey by warranty deed the premises involved herein; and in said Federal Court case, to the predecessor in title of the said defendant, Rosewell E. Messenger.

This defendant further says that the avowed purpose of the loan of five thousand dollars ($5,000), so obtained by said Messenger from the said cross-petitioner, Emily O. Butler, was the pay-
230 ment of taxes due upon the property involved herein, and of the interest due upon the alleged mortgage executed to the plaintiff herein; that notwithstanding the said avowal of the purpose of said loan, said defendant, Rosewell E. Messenger, entered into a conspiracy and collusive arrangement with the said plaintiff, whereby the said Rosewell E. Messenger failed to pay said tax and interest, and the plaintiff instituted this action.

This defendant further says that said arrangement and conspiracy was formed for the purpose of attempting to deprive this defendant of the right to have determined in said Federal Courts the questions of superiority of title as between him and the said defendant, Rosewell E. Messenger, and to divest said Federal Courts of jurisdiction

over said questions; that in said Federal Court proceeding the subject matter thereof was identical with that of this action.

This defendant denies all allegations in the cross-petition of the said Emily O. Butler contained which are not herein admitted to be true.

Wherefore this defendant prays that such cross-petition be dismissed as to him, and that he have and recover his costs.

C. A. THATCHER,
C. H. TRIMBLE,
RHEA P. CARY,
Attorneys for Peter Anderson.

STATE OF NEW YORK,
County of New York, ss:

Rhea P. Cary, being duly sworn says that defendant, Peter Anderson, is a non-resident of and now absent from the state of Ohio, and that affiant is one of his attorneys in this action; that the allegations contained in the foregoing answer are true, he verily believes.

RHEA P. CARY.

Subscribed and sworn to before me this 25th day of April, 1907

[SEAL.] FLORENCE ATEN IVES,
Notary Public, No. 9, Kings County.

Appearing at pp. 65-67 of said record.

On the 6th day of May, 1907, being the 31st day of the April term, 1907, a judgment in said cause was rendered, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

231 No. 55795.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
ROSEWELL E. MESSINGER et al.

This day this cause duly came on for hearing and thereupon came the plaintiff, United States Mortgage & Trust Company, and defendants, Peter Anderson and Rosewell E. Messinger, and the defendant and cross-petitioner, Emily O. Butler, by their respective attorneys, and thereupon said cause was duly submitted to the court upon the first cause of action contained in the answer and cross-petition of the defendant, Emily O. Butler, and without the intervention of a jury, on consideration whereof, the court finds that the fendant, Rosewell E. Messinger, is indebted to this co-defendant Emily O. Butler, in the sum of fifty-one hundred, fifty-two and 55-100 ($5,152.55) dollars, with interest from the first day of this

erm, to-wit: April 1st, 1907, on the note for five thousand ($5,000.00) dollars, set up in the first cause of action in the answer and cross-petition herein, filed by said defendant, Emily O. Butler.

It is therefore, considered by the court that the said Emily O. Butler, recover from the said defendant, Rosewell E. Messinger, the said sum of fifty-one hundred, fifty-two and 55-100 ($5,152.55) dollars with interest from April 1, 1907, and his costs herein expended taxed at $—, and it is hereby ordered that execution issue accordingly.

Appearing at p. 87 of said record.

On the 11th day of May, 1907, there was filed in said court a reply in the above entitled cause, which reply is in words and figures as follows, to-wit:

Common Pleas Court, Lucas County, Ohio.

No. 55795.

United States Mortgage & Trust Company
vs.
Rosewell E. Messinger et al.

Reply to Answer of Peter Anderson to the Cross-petition of Emily O. Butler.

The defendant, Emily O. Butler, for reply to the answer of Peter Anderson, to her cross-petition herein says:

1. She denies the averment of said Anderson that he is the owner in fee simple of the property involved herein, and entitled to the immediate use and possession of the same.

2. She denies the allegations of said Anderson that the
232 mortgage given to her by said Rosewell E. Messenger for five thousand ($5,000) dollars is of no binding force or effect as against said Anderson.

3. She denies the statement in said answer that at the time of the execution of the mortgage referred to in her cross-petition, the said Rosewell E. Messenger had no title in and to the premises purporting to be conveyed by his said mortgage, and avers he then had and ever since has held the full fee simple title to said premises, and that said Peter Anderson as averred in her cross-petition, has not now and never has had any right or title or interest therein.

4. She denies that she appeared and defended by counsel in the suit referred to in the answer of said Anderson as having been brought by him in December, 1904, in the Circuit Court of the United States for the Northern District of Ohio, Western Division, or in any of the subsequent proceedings in said case, as alleged in said answer.

5. She denies that the avowed purpose of the loan of five thou-

sand ($5,000) dollars, obtained by said Messenger from her, was the payment of taxes due upon the property involved herein, and the interest due upon the mortgage executed by said Messenger to the plaintiff herein.

6. She denies that said Rosewell E. Messenger entered into any conspiracy and collusive arrangement with the said plaintiff whereby the said Rosewell E. Messenger failed to pay said taxes and interest.

7. She denies that any arrangement and conspiracy was formed for the purpose of attempting to deprive the defendant, Anderson, of any right to have determined in said Federal Court the questions of alleged superiority of title, as between him and the said defendant, Rosewell E. Messenger, and to divert said Federal Court of jurisdiction over said question, as alleged in said answer.

8. She denies that in said Federal Court proceedings the subject-matter thereof was identical with that of this action.

9. She further denies any and all allegations in said answer inconsistent with her said answer and cross-petition.

She further avers that on May 6, 1907, she duly obtained a judgment against the defendant Rosewell E. Messenger on the first cause of action in her said cross-petition against him and on that day caused an execution thereon to be issued by the clerk of this court directed to the sheriff of Lucas county, Ohio, commanding him to levy same upon the property of said defendant, Messenger,
and said execution was on that day, by said sheriff, for want
233 of goods and chattels, duly levied upon all the property
covered by her said mortgage, being the same property described in the petition herein (together with other property), and said sheriff on the same day duly made his return of such levy to this court, and filed the same with the clerk of this court.

Wherefore, this defendant excepts as to her prayer for a personal judgment as continued in her said cross-petition asks that an account may be taken of how much there is now due here on the judgment above referred to; and in all other respects reiterates the prayer of said cross-petition, and further prays that said Rosewell E. Messenger may be adjudged the owner in fee simple of said premises subject to the mortgages of the plaintiff and of this answering defendant, and freed from all claims of an estate or interest therein of the defendant, Peter Anderson, and for all relief to which upon the facts she may be entitled in law or equity.

O. B. SNIDER,
Attorney for Defendant Emily O. Butler.

STATE OF OHIO,
Lucas County, ss:

O. B. Snider, being first duly sworn says that he is the attorney for the defendant, Emily O. Butler, in the above entitled action, that said Emily O. Butler, is a non-resident of and now absent from said county of Lucas and state of Ohio and that the facts stated in her foregoing reply are true as affiant verily believes.

O. B. SNIDER.

Sworn to before me and subscribed in my presence this 11th day of May, 1907.

[SEAL.] JAS. HARRINGTON BOYD,
Notary Public, Lucas County, Ohio.

Appearing at 90-92 of said record.

On the 13th day of April, 1907, defendant, Rosewell E. Messinger, by his attorneys, filed in said court an amended and supplemental answer and cross-petition in the above entitled cause, which answer and cross-petition is in the words and figures as follows, to-wit:

In the Court of Common Pleas, Lucas County, State of Ohio.

234 UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSINGER, ESTELLE P. MESSENGER, PETER ANDERSON, Emily O. Butler, Jacob Ramser, Barbara Ramser, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Frasch, Trustee; Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Baraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford, John H. Serrels, The Detroit & Tennessee Realty Company, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, the Naval Reserves, Sick & Accident Association of Toledo, The Hygienic Toothpick Company, The Grasser-Brand Brewing Company, the Huebner-Toledo Breweries Company, John Ramser, Emma E. Andress and Frieda Barbara Schneider, Defendants.

Amended and Supplemental Answer and Cross-petition of the Defendant Rosewell E. Messinger.

The defendant, Rosewell E. Messenger, for answer to the petition and by way of amended and supplemental cross-petition herein, says: That he and the defendant, Estelle P. Messenger, his wife, each for some years past has been and each now is a citizen and resident of the state of Ohio; that the plaintiff, United States Mortgage & Trust Company, is a corporation duly incorporated, organized and existing under and by virtue of the laws of the state of New York; that the defendant, The Detroit & Tennessee Realty Company, is a corporation duly incorporated, organized and existing under and by virtue of the laws of the state of Tennessee that the defendants, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves and The Hygienic Toothpick Company, respectively, are co-partnerships formed for the purpose of doing business in the
235 state of Ohio; that the defendant, the Sick & Accident Association of Toledo, The Grasser-Brand Brewing Company and

The Huebner-Toledo Breweries Company are each corporations duly incorporated, organized and existing under and by virtue of the laws of the state of Ohio; that for some years past, the defendant, Emily O. Butler, has been and now is a citizen and resident of the state of New York; and that for some years past the following defendants, viz.: Jacob Ramser, Barbara Ramser, John Ramser, Emma E. Andres, Frieda Barbara Schneider, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Frasch, trustee, Francis Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford, and John H. Serrels, have been and now are citizens and residents of the state of Ohio.

First Defense.

I. For answer to the first cause of action set forth in the petition herein, this answering defendant, Rosewell E. Messenger, admits that on December 10th, 1903, he made and delivered to the plaintiff, United States Mortgage & Trust Company, a promissory note of said date for eighteen thousand ($18,000) dollars, a copy of which is set forth in said first cause of action; that the interest has been paid on said note to May 1, 1906; that there are no endorsements thereon; that said plaintiff, United States Mortgage & Trust Company, is the owner and holder thereof; but this answering defendant denies that the principal amount of said note has become due and payable.

Second Defense.

II. For answer to the second cause of action set forth in the petition herein, this answering defendant, Rosewell E. Messenger, adopts and makes part hereof as fully as though herein repeated each and all of the foregoing allegations and statements and further says that the note described in said second cause of action is the same obligation set forth and described in the first cause of action in said petition. This answering defendant admits the execution and delivery by him, of the mortgage described in the said second cause of action; that the terms and conditions of said mortgage were and are as alleged by plaintiff in said second cause of action; that said mortgage was duly recorded as alleged; and that the taxes and assessments on said premises which became due and payable June 20, 1906, and subsequent thereto, have not been paid and are delinquent; but this answering defendant demands strict proof from said plaintiff with respect to the amount due and to become due under said mortgage.

236 This answering defendant further says that the defendant, Peter Anderson, claims to be the owner of said mortgaged premises, but denies that said Anderson has any right, claim, interest, or estate of any kind or nature whatsoever in or to said mortgaged premises, or any part thereof. This answering defendant admits that the defendant, Emily O. Butler, has an interest in said

premises as mortgagee thereof, but says that the indebtedness secured by said mortgage is not due and payable.

This answering defendant further says that each of the following defendants, viz.: The Detroit & Tennessee Realty Company, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, the Naval Reserves, Sick & Accident Association of Toledo, The Hygienic Toothpick Company, The Grasser-Brand Brewing Company, The Huebner Toledo Breweries Company, Jacob Ramser, Barbara Ramser, John Ramser, Emma E. Andres, Frieda Barbara Schneider, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Frasch, trustee; Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford and John H. Serrels, have an interest in certain parts of said mortgaged premises under leases respectively entered into between this answering defendant and that each of said defendants, and that each of said lessee defendants was for some time prior to, at the commencement of this action, since has been and now is in possession of the respective portions of said premises described in said leases.

First Cause of Action Against the Defendant, Peter Anderson.

III. For amended and supplemental cross-petition herein; and for cause of action against the defendant, Rosewell E. Messenger, the defendant and cross-petitioner, Rosewell E. Messenger, says that he adopts and makes part thereof each and all of the foregoing allegations and statements as fully as though same were set forth at length; and further says that since 1896, for a long time prior to and at the time of the commencement of this action he was, has ever since been and now is in the actual possession of the real estate described in said petition; that during all of said time he has been and now is the owner of said premises; that said defendant, Peter Anderson, gives out and publicly states and claims that he is the owner and entitled to the possession of said premises, as remainder under the last will and testament of his grandfather Henry Anderson, deceased, formerly of Holly Springs, Marshall county, Mississippi,
237 which statement and claim said defendant and cross-petitioner Rosewell E. Messenger, has at all times disputed and denied and now disputes and denies.

That on or about July 1, 1841, one Charles Butler of New York City executed in favor of said Henry Anderson, a note of said date of twenty thousand dollars, ($20,000) payable one day after date, with interest thereon at six per cent. per annum; that on or about September 23, 1841, said Charles Butler, to secure the payment of said note, as signed and transferred to said Henry Anderson a certain note dated May 19, 1838 for twenty-one thousand five hundred dollars ($21,500) executed by one Edward Bissell and payable to the order of said Charles Butler, and also therewith assigned and transferred to said Henry Anderson a certain mortgage securing said

Bissell's note, said mortgage being executed by said Bissell and his wife to said Butler upon all of the premises hereinafter, and in the petition herein described, which mortgage had previously been duly recorded at pp. 267 and 269 in volume 2 of the mortgage records kept in the recorder's office of Lucas county, Ohio; that the said assignment of said mortgage to said Henry Anderson set forth that in fact the same was in trust for the benefit of said Charles Butler and said Henry Anderson received from said Butler, and at all times thereafter held said note and mortgage as collateral security for the payment of Butler's note to the said Henry Anderson and for no other purpose.

That on or about September 9, 1843, said Henry Anderson commenced an action in the Court of Common Pleas of Lucas county, Ohio in chancery to foreclose said Bissell mortgage, said Henry Anderson being the complainant and said Edward Bissell and wife and others being defendants therein; that such proceedings were thereafter had in said action, that said court at its April term, 1844, entered a decree finding the amount due upon the indebtedness secured by said mortgage and ordering said mortgaged premises sold for the payment thereof; that thereafter an order of sale was issued upon said decree to one Edson Allen, master in chancery of said court, who in pursuance of said decree, on or about September 24, 1844, sold said premises to said Henry Anderson at the price of six thousand, nine hundred and twenty-one dollars ($6,921); that thereafter said master gave said Anderson a deed for said premises based upon said sale and dated November 18, 1844; that said Charles Butler was not a party to said suit and was not bound thereby, and his rights in to and under said Bissell mortgage remained the same as between him and said Anderson, and were in no manner affected by said action, decree, proceeding, sale and deed, but said
238 Anderson receiving said deed and thereafter held whatever title was thereby conveyed to him in trust as security for the debt of said Butler to said Anderson, and on the same terms and conditions upon which he had previously held said Bissell note and mortgage, and not otherwise; that said deed from said master commissioner to said Henry Anderson was as to said Charles Butler, in fact a mortgage to secure the indebtedness then owing from said Butler to said Anderson and upon the payment of said indebtedness said Butler was entitled to have the title to said property conveyed to him by said Anderson.

That after receiving said deed said Henry Anderson, on or about April 3, 1846, departed this life, until the time of his death being a resident of Holly Springs in Marshall county, Mississippi; that he left a will which was afterwards duly probated, allowed and recorded in and by the probate court of Marshall county, Mississippi, which court by the constitution and laws of said state, had jurisdiction to probate said will; that Peter Anderson, a brother of said Henry Anderson, Walter Goodman and Peter W. Lucas, all residents of Marshall county, Mississippi were nominated in and by said will as the executors thereof and trustees of the estate of said Henry Anderson and were afterwards during April, 1846, duly ap-

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pointed by said court, such executors and trustees, and were fully authorized and empowered to execute the last will and testament of said Henry Anderson, deceased, and to administer his estate and to adjust, release and discharge all claims in favor thereof; that said Peter Anderson, Walter Goodman, and Peter W. Lucas duly entered upon their duties as such executors and trustees, and thereafter continued in the discharge thereof; that whilst said executors and trustees were acting as aforesaid, they demanded payment from said Charles Butler of said $20,000 note with interest thereon from July 1, 1841, and without any deduction therefrom or credit thereon for said property purchased by said Henry Anderson at said master's sale in said foreclosure suit; and that said Charles Butler from time to time thereafter paid to said executors and trustees the full amount of principal and interest due thereon but said cross-petitioner says he does not know and has not the means of knowing, the exact dates and amounts of said payments, and is therefore unable to state same, but that said facts are well known to said defendant, Peter Anderson.

This defendant and cross-petitioner further says that on or about October 1, 1855, Peter Anderson and Walter Goodman, two of said executors and trustees, for a full and valuable consideration
239 and in pursuance of authority duly conferred upon them by said last will and testament of said Henry Anderson, deceased, duly executed, acknowledged and delivered to said Charles Butler, then living, but since deceased, an instrument in writing in due form of law, relinquishing to said Charles Butler, his heirs, and assigns all the interest and title theretofore held by said Henry Anderson in and to all the premises described in the petition herein and other premises, part of which was adjacent thereto, same being described in said deed as follows:

All those certain lots or parcels of land situate, lying and being in the Vistula division of the city of Toledo, county of Lucas, state of Ohio, known and designated as lots numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1,008), one thousand and nine (1,009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000), and one thousand and one (1,001), said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street as said lots were laid out and numbered on the recorded map of said city; together with all and singular the edifices, buildings, rights, privileges, advantages, hereditaments and appurtenances to the same belonging or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

And this defendant and cross-petitioner, Rosewell E. Messenger, further says that in consideration of the payment of said indebtedness made to said executors, the receipt whereof was duly acknowledged, said executors, by the terms of said instrument in writing fully and forever expressly released and discharged said claim against said Charles Butler and said lien against said premises and

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confirmed the title thereto unto said Charles Butler, his heirs, and assigns forever.

That said instrument in writing was thereafter duly filed for record with and recorded by the recorder of Lucas county, Ohio, at page 110 and following in volume 34 of the public records of deeds of Lucas county, Ohio.

That thereafter on or about April 16, 1860, Peter W. Lucas, one of the executors and trustees of the estate of Henry Anderson, deceased, executed a like instrument in writing relinquishing to said Charles Butler, his heirs and assigns, all the interest and title theretofore held by said Henry Anderson in and to all of said premises last above described. Said instrument in writing was duly executed and was thereafter recorded at pages 112 to 114 in volume 34 of the records of deeds of Lucas county, Ohio.

240 Said defendant and cross-petitioner, Rosewell E. Messenger, further says that after the execution, acknowledgment, delivery and record of said instruments in writing, as aforesaid, cross-petitioner's grandfather, Calvin Bronson, of Toledo, Ohio, then living, but since deceased, and the person under whom said defendant and cross petitioner, Rosewell E. Messenger, claims title to said mortgaged and other premises, in good faith, in full reliance upon the title theretofore acquired to said premises by said Charles Butler, and for a full and valuable consideration to-wit: $17,500, by said Calvin Bronson then paid to said Charles Butler, purchased from said Charles Butler, all of the property last hereinbefore specifically described, including the property described in the petition; that thereupon said Charles Butler on or about April 23, 1860, upon and for said consideration paid by said Calvin Bronson as aforesaid, duly conveyed said premises to said Calvin Bronson, his heirs and assigns forever, by deed duly recorded at page 116 and following in volume 34 of the public records of deeds of Lucas county, Ohio; that thereafter on or about December, 1896, this defendant and cross-petitioner, Rosewell E. Messenger, by regularly executed deeds of conveyance to himself from the other heirs of said Calvin Bronson, deceased acquired and now owns, holds and is in possession of all of that portion of said premises and property next hereinbelow described, and has succeeded to, acquired and owns the entire right, title, estate and interest therein acquired by said Calvin Bronson from said Charles Butler, as aforesaid, viz:

All of lot nineteen (19) except the east nineteen (19) feet of the southwest eighty (80) feet thereof; all of lot — (20); all of lots twenty-one (21), and all of lots thirty (30), thirty-one (31), thirty-two (32), one thousand and eight (1,008), and one thousand and nine (1,009), all in the Vistula division of the city of Toledo Lucas county, and state of Ohio, together with the improvements, privileges and appurtenances unto said premises belonging.

Said defendant and cross-petitioner, Rosewell E. Messenger, further says that he acquired his title to said premises as aforesaid for a full and valuable consideration paid in good faith and in full reliance upon the title theretofore acquired to said premises by said Calvin Bronson deceased, and without knowledge or notice of any

kind whatsoever of any claim on the part of said defendant, Peter Anderson, to any estate, title or interest in or to said premises, or any part thereof; that said defendant, Peter Anderson, is the only living descendant and the only heir at law of said Henry Anderson, deceased; that said defendant, Peter Anderson claims and
241 publicly gives out that said instrument in writing from said executors and trustees of said Henry Anderson to said Charles Butler are for some reason unknown to this defendant and cross-petitioner, defective and insufficient to relinquish and release the interest or title which Henry Anderson theretofore had in and to said lands; and this defendant and cross-petitioner says that said defendant, Peter Anderson has no claim, lien, title, estate or interest whatsoever in and to said premises or any part thereof, as heir or devisee of said Henry Anderson, deceased, or otherwise; and any claim, lien, title, estate or interest in and to said premises or any part thereof, made or asserted by said defendant, Peter Anderson, is by reason of the facts herein set forth, inferior and subordinate to the rights, title and equities therein of this defendant cross-petitioner; that of said instruments in writing of said executors and trustees were or for any reason are insufficient to relinquish and release the title to said premises theretofore held, by Henry Anderson, then the title asserted to said premises by said defendant, Peter Anderson, is in trust and for the benefit of this defendant and cross-petitioner; and that same should be conveyed by said Peter Anderson to this defendant and cross-petitioner as the real owner of said premises.

Said defendant and cross-petitioner, Rosewell E. Messenger, further says that on or about December 24, 1904, said defendant, Peter Anderson, brought an action at law in ejectment against him in the United States Circuit Court for the Northern District of Ohio, Western Division, known therein as cause No. 1,479, wherein said defendant, Peter Anderson, alleged that he was the owner in fee simple and sought to recover the possession of said premises described in the petition herein and in this cross-petition, owned by this defendant and cross-petitioner as aforesaid and damages for the alleged wrongful detention whereof from said defendant, Peter Anderson; that said defendant and cross-petitioner, Rosewell E. Messenger answered in said action denying the claim made and title alleged by said defendant, Peter Anderson, plaintiff herein; that at the December, 1906 term of said court, said action was tried upon said pleadings and upon its merits before the Honorable Robert W. Tayler, judge of said court and a jury; that said trial resulted in a verdict in favor of this defendant and cross-petitioner that final judgment was on the 22nd day of December, 1906, duly entered upon said verdict; and that same remains unreversed and in full force and effect; that said defendant, Peter Anderson, and his counsel give out and publicly state that they expect and intend to prosecute proceedings in error to the Honorable Circuit Court of Ap-
242 peals for the Sixth Circuit to review said judgment that under the law and rules of practice, applicable to the Federal Courts, this defendant and cross-petitioner had not the right to allege

and prove upon the trial of said action before said United States Circuit Court, and has not the right to present to said Circuit Court of Appeals the facts set forth in this cross-petition which would have established and which do establish the equitable cause of action and defenses necessary to be alleged and proved in order to fully protect, maintain, establish and assure this defendant and cross-petitioner in his said title to said premises, and with respect to which and by reason whereof, said defendant and cross-petitioner is without adequate remedy at law.

Said defendant and cross-petitioner, Rosewell E. Messenger, asks that said defendant, Peter Anderson, may be required to answer herein and set forth said adverse estate or interest if any, claimed by him, in and to said mortgaged and other premises, and that the same may be adjudged and decreed to be null and void, and of no effect, that said defendant, Peter Anderson, may be restrained and enjoined by this court, from proceeding further in said action at law in said Federal Court; and that said action may be stayed until the final adjudication and determination of the above entitled action.

Wherefore, said defendant and cross-petitioner, Rosewell E. Messenger prays that an account may be taken of the amount due and to become due plaintiff, United States Mortgage & Trust Company, under its said mortgage; that an account may be taken of the amount to become due the defendant, Emily O. Butler, under her said mortgage; that the priority of said liens may be determined; that the pretended claim of said defendant, Peter Anderson, to said mortgaged and adjacent premises herein before described may be declared to be null and void and of no force or effect; that the possession and title of said defendant and cross-petitioner, Rosewell E. Messenger may be quieted against the same; that if the court finds that said instruments in writing executed by said executors and trustees of the estate of Henry Anderson, deceased, were or are insufficient to relinquish and release to Charles Butler all interest and title theretofore held in said premises by Henry Anderson, and that therefore such interest and title is vested in the defendant, Peter Anderson, that the court decree that such interest and title is so held by said defendant, Peter Anderson, in trust for this defendant, and cross-petitioner and that said defendant, Peter Anderson, be ordered to relinquish and release such interest and title to this defendant and cross-petitioner, by executing and
243 delivering to this defendant and cross-petitioner a proper instrument in writing, in due form of law, within a time to be limited by the court, and in default thereof that the decree of the court shall so operate as to relinquish and release such interest and title to this defendant and cross-petitioner.

Said defendant and cross-petitioner, Rosewell E. Messenger, prays further for all other proper equitable relief.

By KING AND TRACY,
Attorneys for the Defendant and Cross-petitioner, Rosewell E. Messenger.

STATE OF OHIO,
Lucas County:

Rosewell E. Messenger, being first duly sworn, upon his oath says that he is the defendant and cross-petitioner in the above entitled action who files the foregoing amended and supplemental answer and cross-petition, and that the statements therein contained are true, as he verily believes.

ROSEWELL E. MESSENGER.

Sworn to before me and subscribed in my presence this 13th day of April, 1907.

[SEAL.] EUGENE H. WINKWORTH,
Notary Public within and for Lucas County, Ohio.

Appearing at pages 18-79 of said record.

On the 4th day of May, 1907, defendant, Peter Anderson, by his attorneys, filed in said court an answer to amended and supplemental answer and cross-petition of Rosewell E. Messinger, in the above entitled cause, which answer is in the words and figures as follows, to-wit:

In the Court of Common Pleas of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSINGER et al., Defendants.

Answer of Peter Anderson to Amended and Supplemental Answer and Cross-petition of Rosewell E. Messinger.

The defendant, Peter Anderson for answer to the amended and supplemental answer and cross-petition of Rosewell E. Messenger, reserving all proper exceptions to the form of this action, and objecting to and protesting against the jurisdiction of this court over his person and over the subject matter, and particularly objecting to and protesting against the right of this court to pass upon and determine in this foreclosure proceeding, his title to the property described in the petition of the plaintiff herein and in the amended and supplemental answer and cross-petition of the said Rosewell E. Messenger says:

He admits that the plaintiff is a corporation duly incorporated and organized under the laws of the state of New York, but
214 he avers that it is a foreign stock corporation doing business in the state of Ohio, but is not a banking corporation and such a foreign corporation as is exempt from the appointment and maintenance of an agent or person in the state of Ohio, on whom service of summons may be had, as provided by section 1148*d* of the Revised Statutes of Ohio, and avers the plaintiff has failed to appoint and maintain such agent or person in this state. That by reason thereof, the plaintiff at the time of and since the commence-

ment of this action was and has been without capacity or authority to commence and maintain the same; that the plaintiff at the time of and since the commencement of this action, was and has been doing business in the state of Ohio in violation of the laws of said state; and that it has failed to pay the taxes, dues and fees payable to the state of Ohio, as required *to* law.

He admits that the said cross-petitioner, Rosewell E. Messenger was in 1896 and for a long time prior thereto and at the time of the commencement of this action, in the possession of the real estate described in the original petition herein; denies that during all or any part of said time the same cross-petitioner has been the owner of said premises; admits that he, this defendant, gives out and publicly states and claims that he is the owner and entitled to the possession of said premises as remainder man under the will of his grandfather.

This defendant admits the execution on July 1, 1841, by Charles Butler to Henry Anderson of the note for twenty thousand dollars mentioned in said amended and supplemental answer and cross-petition, payable and bearing interest as therein stated; admits the assignment and transfer to the said Anderson by said Butler at the time stated of the Bissell note and mortgage referred to and described in said amended and supplemental answer and cross-petition, as well as the record thereof; admits that the said assignment was in trust, but avers that the only declaration of said trust was contained in the following words:

"I hereby assign this mortgage to Henry Anderson on certain trusts as set forth in a deed this day made.

September 23, 1841.

CHARLES BUTLER."

This defendant admits the beginning in September, 1843, of the action in the Court of Common Pleas of Lucas county, Ohio in chancery, which is mentioned and set forth in said amended and supplemental answer and cross-petition; admits that the said Henry Anderson was the complainant therein and Edward Bissell and wife and others were defendants; admits that a decree was entered at the April term 1844 of said court ordering said property
245 sold; that the same was in fact sold to Henry Anderson, at the price of $6,921.00; that the master in chancery of said court duly executed a deed conveying said premises to the said Henry Anderson on November 18, 1844, but denies that Charles Butler was not a party to the said suit and not bound thereby, and denies that whatever rights therein he had theretofore had remained unaffected by said proceedings sale and deed; denies that the said Henry Anderson thereafter held all title conveyed to him in trust for the said Butler; denies that the deed from said master commissioner to said Anderson was in fact a mortgage as to the said Charles Butler; denies that the said Butler was entitled to have said property conveyed to him.

Said defendant Peter Anderson admits that his grandfather the said Henry Anderson, died on or about April 3, 1846 in Holly

Springs, Mississippi; admits that he left a will which was afterwards duly probated; admits that Peter Anderson, Walter Goodman and Peter W. Lucas, were executors and trustees under said will and qualified and acted as such; admits that the said trustees demanded payment of the indebtedness due the estate of Henry Anderson, deceased, from the said Charles Butler but denies that credit upon such indebtedness was denied the said Butler for the amount of the purchase price of the property purchased by said Henry Anderson at said sale in said foreclosure suit; denies that the said Butler paid to said executors and trustees the full amount of interest and principal of said note, but avers the fact to be that the same is not yet paid in full.

This defendant denies that Peter Anderson and Walter Goodman, acting as executors and trustees, conveyed the property involved herein on October 1, 1885, to the said Charles Butler and denies that the said Peter Anderson and Walter Goodman at any time ever attempted for a full and valuable consideration and in pursuance of any authority conferred upon them to convey said property, and denies that they had any power or authority so to do.

This defendant denies that said indebtedness due from the said Charles Butler to the estate of the said Henry Anderson, deceased, was ever paid in full to the said executors and denies that they ever expressly released and discharged said claim against said Butler.

This defendant admits that on or about April 16, 1869, Peter W. Lucas who had been one of the executors and trustees under the will of Henry Anderson, deceased, undertook to execute in his supposed capacity as executor, but not in his capacity as trustee, a deed to the said Charles Butler, which was recorded as set out in said amended and supplemental answer and cross-petition.

246 This defendant admits that Calvin Bronson undertook to purchase the property involved herein from Charles Butler for a consideration of $17,500, and that the said Butler undertook to convey the same to the said Bronson which alleged conveyance was recorded; that thereafter the said Rosewell E. Messenger attempted to acquire the same by deeds from the other heirs of the said Calvin Bronson, deceased, but denies that he now owns any right, title or interest whatever in said property.

This defendant denies that the said defendant Rosewell E. Messenger acquired any title to said premises except the life estate of this defendant's father which terminated by the latter's death September 16, 1902; and denies that his attempt to do so was without knowledge or notice of the claim upon the property of this defendant; admits that this defendant is the only living descendant and only heir at law of Henry Anderson, deceased; admits that he claims and publicly gives out that the instrument purporting to be executed by said executors and trustees of said Henry Anderson to said Charles Butler is defective and insufficient to convey the title which the said Henry Anderson had, but denies that the reason for said claim is unknown to said defendant Rosewell E. Messinger; denies that this defendant has no claim or interest in and to said property, but avers the fact to be that he is the legal owner thereof and entitled to the immediate possession of the same; denies that his title

estate and interest *is* inferior and subordinate to the rights or equities of the said Rosewell E. Messenger and denies that the said Rosewell E. Messengen had any right or equity thereon; denies that the title asserted by this defendant is in trust for the said Rosewell E. Messenger or any other person, and denies that the same should be conveyed by this defendant to said Rosewell E. Messinger.

This defendant admits the bringing by him against the said Rosewell E. Messenger in the United States Circuit Court for the Northern District of Ohio, Western Division, of the action referred to in said amended and supplemental answer and cross-petition; avers that the same was tried upon its merits in June, 1905, before said Circuit Court, when a judgment was rendered against this answering defendant; avers that thereupon said case was carried to the Circuit Court of Appeals of the United States for the Sixth Circuit, by writ of error when the judgment of said Circuit Court was reversed and the case remanded for a new trial; that in said action said court adjudged that this defendant was the owner of the property involved therein as remainder man under the will of his deceased grandfather, Henry Anderson, and that the said Rosewell E. Mes-
247 senger had no title thereto; admits that at the December term 1906, at said Circuit Court said case was again tried, resulting in a verdict and judgment for the said Rosewell E. Messenger; avers that proceedings in error to the said Circuit Court of Appeals for the Sixth Circuit have been had and perfected to review said judgments and that said case is now pending in said Circuit Court of Appeals; denies that in said court the said Rosewell E. Messenger is precluded from setting up the alleged equitable defenses interposed by him in his amended and supplemental answer and cross-petition herein, and denies that he is without adequate remedy at law; but avers the fact to be that all of the alleged equitable defenses set up and interposed by the amended and supplemental answer and cross-petition herein were presented and urged in the United States Court case and were considered and disallowed by the Honorable United States Circuit Court of Appeals in said action now pending there.

For further answer to the amended and supplemental answer and cross-petition of the said defendant, Rosewell E. Messenger, this defendant avers that the property involved herein was all included in the property in said case of Peter Anderson against Rosewell E. Messenger, now pending in the Circuit Court of Appeals of the United States for the Sixth Circuit and to that court brought by writ of error from the Circuit Court of the United States for the Northern District of Ohio, Western Division, except the part of lot 19 of the Vistula division, which is described in the original petition of the plaintiff herein; that in said case of Peter Anderson vs. Rosewell E. Messenger, the said Rosewell E. Messenger made answer and defended the same; that said action was begun December 27, 1904, and nearly two years before the filing of the original petition in this case, and more than two years before the filing herein of the amended and supplemental answer and cross-petition of the said Rosewell E. Messenger; that the said Circuit Court of the United States and said

Circuit Court of Appeals have acquired and exercised full, complete and perfect jurisdiction over the parties thereto and over the subject matter which parties and which subject matter include the parties and subject matter in the action made by the amended and supplemental answer and cross-petition of the said Rosewell E. Messenger filed herein against this answering defendant with the exception hereinbefore stated as to part of lot 19; that neither of said Federal Courts has surrendered or lost jurisdiction either of said parties or of said subject matter, and that the same is now and has been ever since the beginning of said actions full and complete. This defendant further shows that the part of lot 19 described in the plead-
248 ings herein of the plaintiff and said Rosewell E. Messenger is involved in the case of Peter Anderson vs. United Realty Co., Rosewell E. Messenger, et al., which was originally brought in this court and here decided against this answering defendant and was thereupon carried by writ of error to the Circuit Court of Lucas county, Ohio, where it again resulted in a judgment against this defendant, from which judgment proceedings are now being had to remove to the Supreme Court of Ohio. This defendant represents that said suit of Anderson vs. United Realty Co., et al., involves the ownership and title to said part of lot 19 above referred to and that in said action full and complete jurisdiction of said property and of this answering defendant and of the defendant Rosewell E. Messenger has been heretofore acquired by this court, and by said Circuit Court of Lucas county, Ohio.

This defendant further avers that counsel for the said Rosewell E. Messenger have openly avowed the object and purpose of the amended and supplemental answer and cross-petition filed herein on behalf of the said Rosewell E. Messenger to be the defeat and destruction of any judgment which may be rendered by said Federal Courts in favor of this answering defendant, which claim this defendant avers to be true, and submits to the court that such result would be inequitable, unjust and oppressive and an invasion of the right guaranteed him by the constitution and laws of the United States of America to have tried and determined in any forum of his own selection which is of competent jurisdiction, the claim of title to the property involved herein.

This defendant further avers that the said Rosewell E. Messenger and the plaintiff herein have entered into a collusive arrangement for the purpose of depriving this defendant of the right to try as between himself and the said defendant Rosewell E. Messenger, the questions of the superiority of title to the premises involved herein, in the said Circuit Court of the United States for the Northern District of Ohio, Western Division, in which the proceedings have been had as hereinbefore set out and shown. This defendant states and shows that the default of the said defendant Messenger in the payment of the taxes upon the property involved herein and in the payment of said interest due upon the mortgages held by said plaintiff, was made premeditatedly and for the purpose of bringing about the institution of foreclosure proceedings by said plaintiff in order that an opportunity might thereby be afforded to the said Rosewell

E. Messenger to attempt to again litigate in this court the questions at issue and involved in said Federal Courts. At the time
249 of said default the said defendant Messenger was amply able to pay said interest and said taxes out of the income from the property involved herein and out of the money borrowed from the defendant Emily O. Butler as hereinbefore set out and shown.

For a further defense to this action this defendant says that he has heretofore offered to the plaintiff herein to buy from it the mortgage sought to be therein foreclosed paying therefor its face value with interest to date, and the costs of this proceeding, upon condition that the said plaintiff assign to this defendant said mortgage and note. This offer was by the plaintiff declined, and it still declines to accept the same, and this defendant charges that said declination was made and is continued solely for the purpose and with the intent of aiding said defendant Messenger and in pursuance of the collusive arrangement between said defendant, Messenger, and the plaintiff whereby it sought to deprive said Federal Courts of the jurisdiction acquired by them as hereinbefore shown.

This defendant denies all the allegations in said petition contained which are not herein admitted to be true.

Wherefore this defendant prays that this action be dismissed as to him and that he have and recover his costs.

PETER ANDERSON,
By C. A. THATCHER,
C. H. TRIMBLE &
R. P. CARY,
His Attorneys.

STATE OF OHIO,
Lucas County, ss:

Rhea P. Cary being duly sworn says that the defendant, Peter Anderson is a non-resident of and now absent from the state of Ohio; that affiant is one of his attorneys in this action; that the allegations contained in the foregoing answer are true as he verily believes.

RHEA P. CARY.

Subscribed and sworn to before me this the 3rd day of May, 1907.

[SEAL. AARON SLAGLE,
Notary Public, Lucas County, Ohio.

Appearing at pages 71-78 of said record.

On the 11th day of May, 1907, there was filed in said court a reply of Rosewell E. Messinger in the above entitled cause, which reply is in the words and figures as follows, to-wit:

In the Court of Common Pleas, Lucas County, State of Ohio.

250 UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSINGER et al., Defendants.

Reply.

The defendant and cross-petitioner, Rosewell E. Messenger, for reply to the answer of the defendant, Peter Anderson, to the amended and supplemental answer and cross-petition filed herein by said defendant and cross-petitioner, Rosewell E. Messenger, admits:

That the plaintiff, United States Mortgage & Trust Company, is a stock corporation of the state of New York, doing business in the state of Ohio, but he denies that said company is not a banking corporation; he denies that it is not a foreign corporation as is exempt from the appointment and maintenance of an agent or person in the state of Ohio, on whom service of summons may be had as provided by section 148*d* of the Revised Statutes of Ohio; he denies that said plaintiff has failed to appoint and maintain such agent or person in this state; he denies that by reason of said failure said plaintiff at the time of, and since the commencement of this action, was and has been without capacity of authority to commence and maintain the same, and he denies that said plaintiff, at the time of and since the commencement of this action, was and has been doing business in the state of Ohio in violation of the laws of said state, and that it has failed to pay the taxes, dues and fees payable to the state of Ohio as required by law.

For further reply to said answer of the defendant Peter Anderson, said defendant and cross-petitioner, Rosewell E. Messenger, denies that the only declaration of the trust concerning said Bissell note and mortgage was contained in the following words:

"I hereby assign this mortgage to Henry Anderson on certain trusts as set forth in a deed this day made.

September 23, 1841.

CHARLES BUTLER."

Said defendant and cross-petitioner, Rosewell E. Messenger, denies that said $20,000.00 note given by said Charles Butler to said Henry Anderson has not been paid in full; he denies that the only title he acquired to the premises described in said petition was the life estate of the father of said defendant, Peter Anderson; he denies that said defendant Peter Anderson is the legal owner of said premises; he denies that said defendant Peter Anderson is entitled to the immediate possession thereof; he denies that in said action of Anderson against Messenger, begun December 27, 1904, in the
251 United States Circuit Court, for the Northern District of Ohio, Western Division, and first tried therein at its June term, 1905, the Circuit Court of Appeals of the United States for the Sixth Circuit adjudged that the said defendant Peter Anderson, was

the owner of the property involved in said action as remainder man under the will of his deceased grandfather, Henry Anderson, although adjudged to be such remainder man, and that said Rosewell E. Messenger had no title thereto but admits that the first judgment of said Circuit Court was reviewed on writ of error, and by said Circuit Court of Appeals was reversed and remanded for re-trial.

Said defendant and cross-petitioner admits that proceedings in error to said Circuit Court of Appeals have been begun to review the judgment of said United States Circuit Court rendered in said case in favor of said defendant, Rosewell E. Messenger, at its December term, 1906, but denies that all or any of the equitable defenses set up and interposed by said defendant, Rosewell E. Messenger, in his amended and supplemental answer and cross-petition herein were presented in said United States Court case, and that same were considered and disallowed by said Circuit Court of Appeals in said action.

For further reply herein the defendant and cross-petitioner, Rosewell E. Messenger, admits that the property involved herein is all described in the petition in said case of Anderson against Messenger, brought in said United States Court except the part of lot nineteen in the Vistula division of the city of Toledo, Ohio, described in the original petition of the plaintiff herein; and said defendant and cross-petitioner, Rosewell E. Messenger, admits that he filed an answer and defended in said case in said United States Court; but he denies that said Circuit Court of the United States and said Circuit Court of Appeals have acquired and exercised full, complete and perfect jurisdiction over the parties to said action and over the subject matter therein; and he denies that said parties and said subject matter include the parties and subject matter in the action made by the amended and supplemental answer and cross-petition herein filed by said defendant and cross-petitioner, Rosewell E. Messinger, and avers that the only jurisdiction acquired by either of said Federal Courts in said action was at law and not in equity, and that said jurisdiction is not a- full, complete and efficient to meet the ends of justice as the jurisdiction of the parties hereto and of said subject matter acquired by said Court of Common Pleas, Lucas county, Ohio, herein, and that by reason thereof no conflict of jurisdiction exists between said State Court and said Federal Courts, or either
252 of them, with respect to said litigation, or either of them.

For further reply herein, said defendant and cross-petitioner, Rosewell E. Messinger, admits that that part of lot nineteen in the Vistula Division of the city of Toledo, Lucas county, Ohio, described in his amended and supplemental answer and cross-petition and in the petition filed by plaintiff herein is involved in said case of Anderson vs. The United Realty Company, et als., heretofore heard and determined in said Circuit Court of Lucas county, Ohio; but said defendant and cross-petitioner says he has no knowledge, and therefore denies, that proceedings are now being had to remove said judgment of said Circuit Court of Lucas county, Ohio, to the Supreme Court of said state.

For further reply herein, said defendant and cross-petitioner,

Rosewell E. Messinger, denies that his counsel have openly avowed the object and purpose of his amended and supplemental answer and cross-petition filed herein in his behalf, to be the defeat and destruction of any judgment which may be rendered by said Federal Courts in favor of said defendant, Peter Anderson, and denies that such result would be inequitable, unjust, oppressive and an invasion of the right guaranteed said defendant, Peter Anderson, by the constitution and laws of the United States of America to have tried and determined in any forum of his own selection which is of competent jurisdiction, the claim of title asserted by him to the property involved in this suit.

Said Rosewell E. Messinger further denies that he and the plaintiff herein have entered into collusive arrangement of any kind or sort whatever for the purpose of depriving said defendant, Peter Anderson, of the right to try as between himself and said defendant Rosewell E. Messenger, the question of the superiority of title to the premises involved herein in the Circuit Court of the United States for the Northern District of Ohio, Western Division, and known in said court as the case of Peter Anderson vs. Rosewell E. Messenger.

Said defendant and cross-petitioner, Rosewell E. Messenger, further denies that default in the payment of the taxes payable on the property involved herein and the payment of interest due upon the mortgage held by said plaintiff was made premeditatedly and for the purpose of bringing about the institution of foreclosure suits by said Trust Company in order that an opportunity might thereby be afforded to said defendant and cross-petitioner, Rosewell E. Messenger, to attempt to again litigate in this court, the questions at
253 issue and involved in said Federal Court and he denies that at the time of said default he was amply able to pay said interest and said taxes out of the income from the property involved herein and out of the money borrowed from said defendant, Emily O. Butler.

For further reply herein, said defendant and cross-petitioner, Rosewell E. Messenger, says that he has no knowledge with respect to said alleged offer made by said defendant Peter Anderson, to the plaintiff herein, to buy from it the mortgage sought to be foreclosed herein, or of any of the terms of said offer, except the information furnished him thereof by the pleadings filed herein by said defendant, Peter Anderson; and for want of knowledge said defendant and cross-petitioner, Rosewell E. Messenger, therefore denies the making of said offer; but if said offer was made by the defendant, Peter Anderson, as alleged, and it said offer was declined by plaintiff, as alleged and is yet declined, said defendant and cross-petitioner denies that said declination was made and is continued solely for the purpose and with the intent of aiding him and in pursuance of any collusive or other arrangement between him and said plaintiff whereby plaintiff and this defendant or either of them sought to deprive said Federal Courts of their jurisdiction.

For further reply herein, said defendant and cross-petitioner, Rosewell E. Messenger, says that said alleged offer by said defendant, Peter Anderson, to the plaintiff herein to buy from it the mortgage

sought to be foreclosed in this suit, was not made in good faith, and alleges that said Peter Anderson at the time of making said offer was not willing and able and possessed of the means to carry out same.

For further reply herein, said defendant and cross-petitioner, Rosewell E. Messenger, denies all the allegations in said answer of the defendant Peter Anderson to said amended and supplemental answer and cross-petition not hereinabove expressly admitted or denied.

Wherefore said defendant and cross-petitioner, Rosewell E. Messenger prays that relief may be afforded him herein in pursuance of the prayer set forth in his said amended and supplemental answer and cross-petition, and that he may have all proper equitable relief.

By KING & TRACY,
His Attorneys.

STATE OF OHIO,
Lucas County, ss:

Rosewell E. Messenger being first duly sworn upon his oath says that he is the defendant and cross-petitioner who files the foregoing reply, and that the facts stated therein are true as he verily believes.

254 - ROSEWELL E. MESSENGER.

Sworn to before me and subscribed in my presence this 11th day of May, 1907.

E. H. CLOSE.
[SEAL.] *Notary Public, Lucas County, Ohio.*

Appearing at pages 92-98 of said record.

On the 29th day of May, 1907, being the 51st day of the April term, 1907, an order in said cause was made, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

No. 55794.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
PETER ANDERSON et al.

No. 55795.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
ROSEWELL E. MESSINGER et al.

This day came the parties to the above entitled actions, by their respective attorneys, except the defendants interested in the premises made the subject of said actions as lessees; and thereupon, without prejudice to the rights of said lessee defendants, it is, by and with

the consent of all of the other parties to each of said above entitled actions ordered that said causes be and they are hereby consolidated, and, by like consent, it is further ordered that said causes hereafter proceed under the number and title of said first entitled cause, viz: United States Mortgage & Trust Company, plaintiff, vs. Peter Anderson, et al., defendants, known as number 55,794 in said court.

Appearing at page 124 of said record.

Thereupon the defendant, further to maintain the issues upon his part, offered and read in evidence from duly certified transcript of proceedings and final record in the court of common pleas of Lucas county, Ohio, in cause No. 55,794 therein, entitled United States Mortgage & Trust Company, plaintiff, vs. Peter Anderson, Rosewell E. Messinger et al., defendants, and being the certified transcript heretofore received in evidence, marked "Exhibit D," hereto attached and hereby made part of this bill of exceptions, as follows:

On the 29th day of May, 1907, being the 51st day of the April term, 1907, a decree in said cause was rendered, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

253 No. 55794.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
PETER ANDERSON, ROSEWELL E. MESSINGER et al.

On the 28th day of May, 1907, this cause duly came on for hearing; and thereupon came the plaintiff, United States Mortgage & Trust Company, and defendants, Peter Anderson and Rosewell E. Messinger, and the defendant and cross-petitioner, Emily O. Butler, by their respective attorneys; and thereupon said cause was duly submitted to the court upon the first cause of action contained in the petition of the plaintiff, United States Mortgage & Trust Company, and without the intervention of a jury, on consideration whereof, the court finds that the defendant, Rosewell E. Messinger, is indebted to plaintiff, United States Mortgage & Trust Company, in the sum of forty-seven thousand, one hundred dollars ($47,100.00), with interest on forty-five thousand dollars ($45,000.00) thereof, at five per cent. per annum, and with interest on two thousand, one hundred dollars ($2,100.00) thereof at six per cent per annum, each of said sums bearing interest as aforesaid from April 1, 1907, the first day of the present term of this court.

It is therefore considered by the court that said plaintiff, United States Mortgage & Trust Company, have and recover from said defendant, Rosewell E. Messinger, said sum of forty-seven thousand, one hundred dollars ($47,100.00), with interest on forty-five thousand dollars ($45,000.00) thereof at five per cent. per annum, and with interest on two thousand, one hundred dollars ($2,100.00) thereof at six per cent. per annum, each of said sums bearing interest from April 1, 1907, the first day of the present term of this

court; and further that plaintiff recover its costs herein expended, taxed at $—, and it is hereby ordered that execution issue accordingly. Thereupon the defendant, Peter Anderson, duly excepted to each and all of the foregoing findings, orders and judgment.

Appearing at pages 122-123 of said record.

On the 29th day of May, 1907, being the 51st day of the April term, 1907, a decree in said cause was rendered, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

No. 55794.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
PETER ANDERSON and ROSEWELL E. MESSINGER and Others.

256 No. 55795.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
ROSEWELL E. MESSINGER, PETER ANDERSON, and Others.

This 29th day of May, 1907, this consolidated cause duly came on for hearing, and thereupon came the plaintiff, United States Mortgage & Trust Company, and defendants, Peter Anderson, Rosewell E. Messinger and Emily O. Butler by their respective attorneys, and thereupon said cause was duly submitted to the court upon the first cause of action contained in the petition of plaintiff in constituent cause No. 55795, entitled United States Mortgage & Trust Company against Rosewell E. Messinger and others, and without the intervention of a jury; on consideration whereof the court finds that the defendant, Rosewell E. Messinger, is indebted to plaintiff, United States Mortgage & Trust Company, in the sum of eighteen thousand, nine hundred and eighteen and 94-100 ($18,918.94) dollars with interest on eighteen thousand ($18,000.00) dollars thereof at five and one-half per cent. per annum, and with interest on nine hundred and eighteen and 94-100 ($918.94) dollars thereof at six per cent. per annum, each of said sums bearing interest as aforesaid from April 1, 1907, the first day of the present term of this court.

It is therefore considered by the court that said plaintiff, United States Mortgage & Trust Company, have and recover from said defendant, Rosewell E. Messinger, said sum of $18,918.94, with interest on $18,000.00 thereof at 5½ per cent per annum, and with interest on $918.94 thereof at 6 per cent per annum, each of said sums bearing interest from April 1, 1907, the first day of the present term of this court; and further, that plaintiff recover its costs

herein expended, to be taxed, and it is hereby ordered that execution issue accordingly.

Thereupon the defendant, Peter Anderson, duly excepted to each and all of the foregoing findings, orders and judgment.

Appearing at pp. 123-124 of said record.

On the 31st day of May, 1907, being the 52nd day of the April term, 1907, an order in said cause was made, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

No. 55794.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
PETER ANDERSON et al.

257 This 31st day of May, 1907, came the above named parties by their respective attorneys, and thereupon pursuant to adjournment, the trial of the above entitled consolidated causes was duly proceeded with, and in the course thereof, testimony was offered and received in behalf of each of said parties; and said consolidated causes were duly submitted to the court for its consideration, decision, judgment and decree, to which defendant, Peter Anderson, excepts.

Appearing at p. 126 of said record.

On the 5th day of June, 1907, being the 56th day of the April term, 1907, a decree in said cause was rendered, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

In the Court of Common Pleas, Lucas County, State of Ohio.

No. 55794.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,

vs.

PETER ANDERSON, ROSEWELL E. MESSENGER, ROSEWELL E. Messenger Trustee for Charles Ruell Messenger; Estelle P. Messenger, Emily O. Butler, Jacob Ramser, Barbara Ramser, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Frasch, Trustee; Francis P. Chapin, Rudolph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Zaraick, Robert Raitz, ——— Klussman, Charles E. Stafford, John J. Winsor, Frederick J. ———, John H. Serrels, The Detroit & Tennessee Realty Company, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers and Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves, Sick & Accident Association of Toledo, The Hygienic Toothpick Company, The Grasser-Brand Brewing Company, The Huebner-Toledo Breweries Company, John Ramser, Emma E. Andres and Frieda Barbara Schneider, Defendants.

258 *Journal Entry.*

Consolidated with—

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,

vs.

ROSEWELL E. MESSINGER et al., Defendants.

The above entitled actions having heretofore been duly consolidated, heard by and submitted to said court upon the issues joined herein, upon the pleadings filed in said respective actions by the plaintiff, United States Mortgage & Trust Company, by the defendants and cross-petitioners, Emily O. Butler and Rosewell E. Messenger, respectively, and by the defendant, Peter Anderson, and upon the evidence duly produced and offered before said court therein, and it duly appearing to the court, and the court finding that upon precipe therefor of the plaintiff, United States Mortgage & Trust Company, each and all of said defendants to said respective actions have been duly personally served with summons or by publication therein, the court finds that each and all of the defendants to each of said actions, other than said defendant, Peter Anderson, and said defendants and cross-petitioners, Emily O. Butler and Rosewell E. Messenger, are in default for demurrer or answers to the petition filed in each of said actions, and that the allegations of each of said petitions are confessed to be true by each of said defendants so in default, and the court further finds that the plaintiff and each and all of the defendants to each of said actions, except the defendant, Peter Anderson, are in default for demurrer or an-

swer to the answer and cross-petition of the defendant and cross-petitioner, Emily O. Butler, filed in each of said actions and that the allegations of each of said answers and cross-petitions of said Emily O. Butler, are by the plaintiff, and by each of said defendants, so in default, confessed to be true.

And it further duly appearing to the court, and the finding that upon precipe therefor of the defendant, and cross-petitioner, Rosewell E. Messenger, the plaintiff, and each and all of said defendants, to said respective actions, other than said defendants, Rosewell E. Messenger, have each been duly, personally served with summons or by publication therein, the court finds that each and all of said parties, other than the defendant, Peter Anderson, are in default for demurrer or answer to the amended and supplemental answer and cross-petition of the defendant and cross-petitioner, Rosewell E. Messenger, filed in each of said actions, and that the allegations of each of said amended and supplemental answers and
259 cross-petitions of said defendant and cross-petitioner, Rosewell E. Messenger, are confessed by the plaintiff and by said defendants and each of them, other than said defendant, Peter Anderson, to be true.

And upon the issues joined upon said pleadings in said actions, between the plaintiff, United States Mortgage & Trust Company, the defendants and cross-petitioners, Emily O. Butler, and Rosewell E. Messenger, respectively, and the defendant, Peter Anderson, the court finds against said defendant, Peter Anderson, and in favor of said plaintiff, United States Mortgage & Trust Company, and in favor of the defendant and cross-petitioner, Emily O. Butler, and in favor of the defendant and cross-petitioner, Rosewell E. Messenger, and that the equities upon said issues joined are with said plaintiff and said defendants and cross-petitioners, respectively, as against said defendant, Peter Anderson, and that the defendant, Peter Anderson, has no claim, right, title, interest or estate whatsoever, in or to the premises described in any of said pleadings in either of said actions, or in any part thereof.

To each and all of which findings said defendant, Peter Anderson, by his counsel then and there duly excepted.

And the court further finds that each and all of the allegations in the said petitions of the plaintiff, United States Mortgage & Trust Company, and in the said answers and cross-petitions of the defendant and cross-petitioner Emily O. Butler and in the said amended and supplemental answers and cross-petitions of the defendant, Rosewell E. Messenger, are true; that a certain instrument executed by said Edson Allen, Master Commissioner, to Henry Anderson, and recorded in Volume 10 at page 168 of the records of deeds of Lucas county, Ohio, was in fact, as to Charles Butler, the then owner of the property described in the amended and supplemental answer and cross-petition of the defendant and cross-petitioner, Rosewell E. Messenger, a mortgage, and such title as said Henry Anderson took to said property, by virtue of said instrument, was held by him as surety for the payment of a debt then owing

by said Charles Butler to said Henry Anderson, and for no other purpose; and that thereafter said Charles Butler duly paid to said Henry Anderson, and to the executors of his said estate, said debt in full, and that said executors of Henry Anderson duly released and discharged said Charles Butler from any and all claims which the estate of said Henry Anderson had theretofore held against him, and conveyed all of the title theretofore held by said Henry Anderson, and by them as his said executors in and to said property, to
the said Charles Butler and forever released and discharged
260 said Charles Butler from any and all debts, claims and demands of every kind which said Henry Anderson or his said executor had theretofore held or owned against said Charles Butler.

The court further finds, that said defendant and cross-petitioner, Rosewell E. Messenger is entitled to have a release, discharge and conveyance from the defendant, Peter Anderson, of any and all claims, interest, lien or title which he has or claims to have against the premises described in the said amended and supplemental answer and cross-petition of said defendant and cross-petitioner, Rosewell E. Messenger, said premises being described as follows:

All of lot nineteen (19), except the east nineteen (19) feet of the southwest eighty (80) feet thereof; all of lot twenty (20), all of lot twenty-one (21), and all of lot thirty (30), thirty-one (31), thirty-two (32), one thousand and eight (1,008), and one thousand and nine (1,009), all in the Vistula division of the city of Toledo, Lucas county, and state of Ohio, together with the improvements, privileges and appurtenances unto said premises belonging.

To each and all of which findings, said defendant, Peter Anderson, by his counsel, then and there duly excepted.

And it is, therefore, hereby ordered, adjudged and decreed that within three days from the entry hereof said defendant, Peter Anderson, shall execute and deliver to said defendant and cross-petitioner, Rosewell E. Messenger, a proper deed of release and quit-claim of any and all such claims, interest, lien or title of the said defendant, Peter Anderson, in or to said premises, and each and every part thereof, and that in default of said defendant, Peter Anderson, so executing and delivering such deed within the time last aforesaid, this decree shall operate as such conveyance; and the title of said defendant and cross-petitioner, Rosewell E. Messenger, to said premises described in his said amended and supplemental answers and cross-petitions, and each and every part thereof, is hereby quieted as against said defendant, Peter Anderson, and any and all persons claiming under him, and said defendant, Peter Anderson, is hereby barred and forever enjoined from setting up, asserting or claiming any claim, interest, lien, right, title or estate in or to said property, or any part thereof.

To which decision, decree and orders, and to each and every part thereof, said defendant, Peter Anderson, by his counsel, then and there duly excepted.

And the court further finds, that there is due to the plaintiff,

United States Mortgage & Trust Company, from the defendant, Rosewell E. Messenger, upon the note described in and
261 secured by the mortgage set forth in the second cause of action, in the petition filed by said plaintiff in said cause No. 55,794, the sum of $47,100.00, with interest on $45,000.00 thereof at five per cent per annum, from April 1, 1907, and with interest on $2,100.00 thereof at six per cent per annum from April 1, 1907, said date being the first day of the present term of this court; said indebtedness being the same for which personal judgment was entered herein on May 28, 1907.

That on November 1, 1897, to secure the payment of the indebtedness evidenced by said note, said defendant, Rosewell E. Messenger, then unmarried, individually, and as trustee for the defendant, Charles Ruell Messenger, duly executed and delivered to said plaintiff, United States Mortgage & Trust Company, the mortgage described in said second cause of action in said petition, filed in said cause No. 55,794, and on certain premises in the city of Toledo, in Lucas county, Ohio, described in said mortgage, and being premises bounded and described as follows:

Beginning at the intersection of the southeasterly boundary line of St. Clair street and the southwesterly boundary line of Cherry street; running thence in a southeasterly direction along said boundary line of Cherry street, a distance of two hundred and six and 40-100 (206.40) feet; thence in a southwesterly direction at right angles with Cherry street, a distance of sixty-four and 99-100 (69.99) feet; thence in a northwesterly direction along a line parallel with Cherry street to Summit street; thence in a northeasterly direction along Summit street to St. Clair street; thence in a northeasterly direction along St. Clair street to the place of beginning, being a part of lots thirty (30), thirty-one (31), thirty-two (32), ten hundred and eight (1,008), and ten hundred and nine (1009), in the Vistula division of said city of Toledo, Lucas county, Ohio.

That on December 15, 1897, said mortgage was duly left for record in the office of the recorder of Lucas county, Ohio, and was by said recorder duly recorded at page 603, and following, in volume 211 of the mortgage records of said county, and that, subject to taxes and assessments upon said premises, said mortgage is a valid and subsisting first and best lien on said above decribed real estate, and that the conditions of said mortgage have been broken.

To each and all of which findings said defendant, Peter Anderson, by his counsel, then and there duly excepted.

It is, therefore, further hereby ordered, adjudged and decreed that unless the defendant, Rosewell E. Messenger, shall within
262 three (3) days from the entry of this decree pay or cause to be paid to the clerk of this court the costs in said action No. 55,794, and to said plaintiff, United States Mortgage & Trust Company, the sum of $47,100.00 with interest on $45,000.00 thereof at five per cent. per annum from April 1, 1907, and with interest on $2,100.00 thereof at six per cent. per annum from April 1, 1907,

that the equity of redemption of the defendants herein, and each of them, be foreclosed, and that said premises hereinabove and in the petition in said action No. 55,794 described, be sold, and that upon precipe of said plaintiff therefor, an order of sale issue, directed to the sheriff of Lucas county, Ohio, commanding him to appraise, advertise and sell said premises as upon execution, and that said sheriff distribute and pay the proceeds arising from any such sale as follows:

1. To the clerk of this court, the costs taxed and to be taxed in said action No. 55,794;

2. To the treasurer of Lucas county, Ohio, the taxes and assessments levied and assessed against said premises described in the petition filed in said action No. 55,794;

3. To the plaintiff, United States Mortgage & Trust Company, the sum of $47,100, with interest on $45,000.00 thereof at five per cent. per annum from April 1, 1907, and with interest on $2,100.00 at six per cent. per annum from April 1, 1907;

4. To the defendant and cross-petitioner, Emily O. Butler the sum of $5,152.55, with interest thereon at six per cent. per annum from April 1, 1907;

5. And to the defendant and cross-petitioner Rosewell E. Messenger, the balance of the proceeds, if any.

And on motion of plaintiff, and for good cause shown, it is hereby ordered that advertisement of sale of said premises in a German newspaper be and is hereby dispensed with.

To which decision, decree and orders, and to each and every part thereof, said defendant, Peter Anderson, by his counsel, then and there duly excepted.

And the court further finds, that there is due to the plaintiff, United States Mortgage & Trust Company, from the defendant, Rosewell E. Messenger, upon the note described in and secured by the mortgage set forth in the second cause of action, in the petition filed by said plaintiff in said cause No. 55,795, the sum of eighteen thousand, nine hundred, eighteen and 94-100 dollars, ($18,918.94) with interest on eighteen thousand dollars ($18,000.00) thereof at five and one-half (5½) per cent. per annum, from April 1, 1907,
and with interest on nine hundred eighteen and 94-100 dol-
263 lars ($918.94) thereof at six per cent. per annum, from
April 1, 1907, said date being the first day of the present term of this court; said indebtedness being the same for which personal judgment was entered herein on May 29, 1907;

That on December 10, 1903, to secure the payment of the indebtedness evidenced by said note, said defendant, Rosewell E. Messenger, and his wife, the defendant, Estelle P. Messenger, duly executed and delivered to said plaintiff, United States Mortgage & Trust Company, the mortgage described in said second cause of action in said petition, filed in said cause No. 55,795, and on certain premises in the city of Toledo, in Lucas county, Ohio, described in said mortgage, and being premises and described as follows:

All that part of lots thirty (30), thirty-one (31), one thousand and eight (1,008), and one thousand and nine (1,009) which lies southwest of a line parallel with and sixty-four and 99/100 (64.99) feet southwest of the southwest boundary line of Cherry street;

Also all that part of lot 32, which lies southwest of said line parallel with and 64.99 feet southwest of said southwest boundary line of Cherry street; and also all that part of said lot 32, which lies southeast of a line drawn at right angles with Cherry street from a point 206.40 feet southeast of the southeast line of St. Clair street and northeast of a line parallel with and 64.99 feet southwest of the southwest boundary line of Cherry street;

Also all that part of lot 19, which lies northwest of a line parallel with and 19 feet northwest of the southeast line of said lot 19; and also all that part of said lot 19, which lies southeast of said parallel line and northeast of a line parallel with and 80 feet northeast of the southwest line of said lot 19;

Also the whole of lots 20 and 21.

All of said premises being situate in the Vistula division in the city of Toledo, Lucas county, Ohio.

That said defendant, Estelle P. Messenger, wife of the defendant, Rosewell E. Messenger, joined in said mortgage, and thereby conveyed and released all her right and expectancy of dower in and to said above described premises;

That on December 10, 1903, said mortgage was duly left for record in the office of the recorder of Lucas county, Ohio, and was by said recorder duly recorded at page 464, and following, in volume 279 of the mortgage records of said county, and that, subject to taxes and assessments upon said premises next hereinabove described, said mortgage is a valid and subsisting first and best lien upon said real estate, and that the conditions of said mortgage have been broken;

To each and all of which findings said defendant, Peter Anderson, by his counsel, then and there duly excepted.

And it is, therefore, further hereby ordered, adjudged and decreed that unless the defendant, Rosewell E. Messenger, shall within three days (3) from the entry of this decree pay or cause to be paid to the clerk of this court the costs in said action No. 55,795, and to said plaintiff, United States Mortgage & Trust Company, the sum of $18,918.94, with interest on $18,000.00 thereof at five and one-half per cent. per annum from April 1, 1907, and with interest on $918.94 thereof at six per cent. per annum from April 1, 1907, that the equity of redemption of said defendants herein, and each of them, be foreclosed, and that said premises next hereinabove and in the petition in said action No. 55,795 described, be sold, and that upon precipe of said plaintiff therefor, an order of sale issue, directed to the sheriff of Lucas county, Ohio, commanding him to appraise, advertise and sell said premises as upon execution, and that said sheriff distribute and pay the proceeds arising from any such sale as follows:

1. To the clerk of this court, the costs taxed and to be taxed in said action No. 55,795;

2. To the treasurer of Lucas county, Ohio, the taxes and assessments levied and assessed against said premises described in the petition filed in said action No. 55,795;

3. To the plaintiff, United States Mortgage & Trust Company, the sum of $18,918.94, with interest on $18,000.00 thereof at five and one-half per cent. per annum from April 1, 1907, and with interest on $918.94 thereof at six per cent. per annum from April 1, 1907;

4. To the defendant, and cross-petitioner, Emily O. Butler, the sum of $5,152.55, with interest thereon at six per cent. per annum from April 1, 1907.

5. And to the defendant and cross-petitioner, Rosewell E. Messenger, the balance of the proceeds, if any.

And on motion of plaintiff, and for good cause shown it is hereby ordered that advertisement of sale of said premises in a German newspaper be and — hereby dispensed with.

To which decision, decree and orders, and to each and every part thereof, said defendant, Peter Anderson, by his counsel, then and there duly excepted.

265 And the court further finds, that there is due to the defendant and cross-petitioner, Emily O. Butler, from the defendant, Rosewell E. Messenger, upon the note described in and secured by the mortgage set forth in the several cross-petitions filed by said defendant and cross-petitioner, Emily O. Butler, in said cause No. 55,794, and in said cause No. 55,795, the sum of five thousand, one hundred fifty-two and 55 100 dollars ($5,152.55) with interest thereon at six per cent. per annum, from April 1, 1907, the first day of the present term of this court; said indebtedness being the sum for which personal judgment was rendered herein on May 6, 1907;

That on September 27, 1906, to secure the payment of the indebtedness evidenced by said note, said defendant, Rosewell E. Messenger, and his wife, the defendant, Estelle P. Messenger, duly executed and delivered to said defendant and cross-petitioner, Emily O. Butler, the mortgage described in said several answers and cross-petitions filed by said cross-petitioner in said actions Nos. 55,794 and 55,795, and on certain premises in the city of Toledo, in Lucas county, Ohio, described in said mortgage, and being the following premises:

Lots numbered twenty (20), twenty-one (21), except the southeast, nineteen (19) feet of the southwest eighty (80) feet thereof, thirty (30), thirty-one (31), thirty-two (32), one thousand and eight (1,008), and one thousand and nine (1,009), all in the Vistula division of the city of Toledo, Lucas county, state of Ohio.

That on September 28, 1906, said mortgage was duly left for record in the office of the recorder of Lucas county, Ohio, and was by said recorder duly recorded at page 301, and following, in volume 328 of the mortgage records of said county, and that, subject to taxes and assessments upon said premises, said mortgage is a valid and subsisting lien on said real estate next hereinabove described, next in order of priority after the lien thereon of said

several mortgages hereinabove described, and under which the plaintiff, United States Mortgage & Trust Company, is found to have the first and best lien;

That said defendant, Estelle P. Messenger, wife of said defendant, Rosewell E. Messenger, executed said mortgage under the name of Harriet E. Messenger, and is the same person as said defendant, Estelle P. Messenger, and that thereby said defendant, Estelle P. Messenger, conveyed and released all her right and expectancy of dowr in and to said premises next hereinabove described.

266 And the court further finds, that the conditions of said mortgage given by said defendant, Rosewell E. Messenger and wife, to said defendant and cross-petitioner, Emily O. Butler, have been broken.

To each and all of which findings said defendant, Peter Anderson, by his counsel, then and there duly excepted.

And it is therefore, further hereby ordered, adjudged and decreed that unless the defendant, Rosewell E. Messenger, shall within three (3) days from the entry of this decree pay or cause to be paid to the clerk of this court the costs herein and to the defendant and cross-petitioner, Emily O. Butler, the sum of $5,152.55 with interest thereon at six per cent. per annum, from April 1, 1907, that the equity of redemption of said defendants herein, and of each of them, be foreclosed, and that said premises described in the answer and cross-petition of said defendant and cross-petitioner, Emily O. Butler, be sold and that upon precipe therefor of said defendant and cross-petitioner, Emily O. Butler, an order of sale issue, directed to the sheriff of Lucas county, Ohio, commanding him to appraise advertise and sell said premises as upon execution, and that said sheriff distribute and pay the proceeds arising from any such sale as follows:

1. To the clerk of this court, the costs taxed and to be taxed in said consolidated actions:

2. To the treasurer of Lucas county, Ohio, the taxes and assessments levied and assessed against said premises described in the answers and cross-petition of said defendant and cross-petitioner, Emily O. Butler.

3. To the plaintiff, United States Mortgage & Trust Company, the several amounts hereinabove found due said plaintiff, with interest as aforesaid, and for which a lien has been secured in favor of plaintiff;

4. To the defendant and cross-petitioner, Emily O. Butler, the sum of $5,152.55, with interest thereon at six per cent. per annum — April 1, 1907;

5. And to the defendant and cross-petitioner, Rosewell E. Messenger, the balance of the proceeds, if any.

And on motion of plaintiff, and for good cause shown, it is hereby ordered that advertisement of sale of said premises in a German newspaper be and is hereby dispensed with.

And it is further ordered that the purchaser or purchasers at any sale under this decree shall be subrogated to all the rights, claims and liens of said mortgagees, and each of them, and of any of the

other parties to said consolidated actions, so far as may be
267 necessary to assure and protect the title of such purchaser or purchasers.

To each and all of the foregoing findings, decisions, decrees and orders, said defendant, Peter Anderson, by his counsel, then and there duly excepted.

And thereupon the defendant, Peter Anderson, by his counsel, duly gave notice of his intention to appeal said consolidated actions to the Circuit Court of Lucas county, Ohio; and, on motion therefor, the court fixes the amount of the bond to be given by said defendant, in case said appeal is perfected, at the sum of one thousand dollars.

Appearing at pp. 128-139 of said record.

Thereupon the defendant, further to maintain the issues upon his part, offered in evidence duly certified transcript of the proceedings and record in the Circuit Court of Lucas county, Ohio, in cause No. 2,192 therein, entitled United States Mortgage & Trust Company, plaintiff, vs. Peter Anderson, Rosewell E. Messinger et al., defendants, said certified transcript being hereto attached, marked "Exhibit F," and hereby made part of this bill of exceptions, being the proceedings in said Circuit Court upon appeal thereto by said defendant, Peter Anderson, from the Court of Common Pleas of Lucas county, Ohio, of said cause No. 55,794, entitled United States Mortgage & Trust Company, plaintiff, vs. Peter Anderson, Rosewell E. Messinger et al., defendants, consolidated with said cause No. 55,795, entitled United States Mortgage & Trust Company, plaintiff, vs. Rosewell E. Messinger, Peter Anderson et al., defendants; and same being received in evidence, the defendant by his counsel read in evidence therefrom as follows:

On the 1st day of July, 1907, defendant, Peter Anderson, by his attorneys, filed in said Court of Common Pleas as appears by the endorsement thereon of the clerk of said court, an appeal bond in the above entitled cause, which appeal bond is in the words and figures as follows, to-wit:

Appeal Bond.

Know all men by these presents, that we, Peter Anderson and The United States Fidelity & Guaranty Company, are held and firmly bound unto United States Mortgage & Trust Company, Emily O. Butler, Rosewell E. Messinger, and all other defendants in the case hereinafter named, in the penal sum of one thousand dollars, to the payment of which, well and truly to be made, we do hereby jointly and severally, bind ourselves, our heirs, executors and administrators, and successors and assigns.

Signed by us, and dated this 28th day of June, 1907.

The condition of the above obligation is such, that,

268 Whereas, the said Peter Anderson has taken an appeal from certain orders, judgments and decrees rendered against

him in favor of the said United States Mortgage & Trust Company, Emily O. Butler, Rosewell E. Messinger and other defendants, in cause No. 55,794, United States Mortgage & Trust Company vs. Peter Anderson et al., consolidated with the case of United States Mortgage & Trust Company, vs. Rosewell E. Messinger et al., being No. 55,795 in the Court of Common Pleas, within and for the county of Lucas, and State of Ohio, at the April term thereof, A. D., 1907, to the Circuit Court within and for the county aforesaid.

Now, if the said Peter Anderson shall abide and perform the orders and judgments of the said Circuit Court, and shall pay all moneys, costs and damages, and do such other things as may be required of him or ruled against him by said Circuit Court, then this obligation to be void; otherwise to remain in full force and virtue.

PETER ANDERSON,
By C. A. THATCHER,
His Attorney.
THE UNITED STATES FIDELITY & GUARANTY CO.,
L. W. FROST,
CALVIN BARKER,
Its Attorneys in Fact.

I approve the above bond and the surety thereto, this 28th day of June, 1907.

[SEAL.] ED. L. KIMES, *Clerk.*
W. T. HUNTSMAN, *Deputy.*

Apeparing at pp. 255-256 of said record.

2,192 CC. 55,795 CP.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
PETER ANDERSON et al.

Proceedings before the Circuit Court of the state of Ohio, within and for the county of Lucas and state of Ohio at a term thereof begun and held at the court house in the city of Toledo in said county on the 6th day of January in the year of our Lord one thousand nine hundred and eight.

Present: Honorable George R. Haynes, Honorable Robert S. Parker, Judges; Honorable Samuel A. Wildman.

Be it remembered that heretofore, to-wit: on the 1st day of July, 1907, the clerk of the Court of Common Pleas within and for the county of Lucas and state of Ohio, filed in the Circuit Court of said state and county, the original pleadings and papers filed in the above entitled cause in said Court of Common Pleas together
269 with a certified copy of the final decree and all journal entries made in said cause by said last named court.

Appearing at p. 1, of said record.

On the 9th day of March, 1908, defendant, Peter Anderson, by his attorneys filed in said Circuit Court an amendment to his answer to the petition of plaintiff in the above entitled cause, which answer was afterwards refiled on the 10th day of March, 1908.

On the 10th day of March, 1908, defendant, Peter Anderson, by his attorneys, refiled in said Circuit Court an amendment to his answer to plaintiff's petition in the above entitled cause which amendment to answer is in the words and figures as follows, to-wit:

In the Circuit Court of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al., Defendants.

Consolidated with

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSINGER et al., Defendants.

Amendment to Answer of Peter Anderson to the Petition of Plaintiff.

Defendant, Peter Anderson, by way of amendment to his answer to the petition of the plaintiff filed against him and others, leave of court to file said amendment having first been had and obtained, and reserving to himself all proper exceptions to the form of this action and objecting and protesting against the form of the action and the jurisdiction of this court over his person, and objecting to and protesting against the right of this court to pass upon and determine in this foreclosure proceeding, his title to the property described in the petition of the plaintiff herein, now states and shows to the court that since the filing of his original answer herein the case of Peter Anderson vs. Rosewell E. Messinger then pending on proceedings in error in the Circuit Court of Appeals for the Sixth Circuit, and referred to in said original answer, was heard, considered and determined by said Circuit Court of Appeals, said hearing having been had on the 17th day of October, 1907, and said determination having been reached on the 3rd day of December, 1907. This answering defendant further states and shows to the court that in said case was involved and considered the question of
270 the proper construction of the will of Henry Anderson, deceased, under whose will this answering defendant in said ejectment case of Peter Anderson vs. Rosewell E. Messenger, claimed and this defendant was adjudged to be the owner of the property involved therein and herein. This answering defendant further states and shows to the court that in said case was involved all the questions of the superiority of title to the property involved therein and herein as between this answering defendant and the said Rosewell E. Messinger, and that therein the said Messinger pre-

sented and urged all of the alleged legal and equitable defenses interposed in this action, and that all of said defenses so urged and interposed, were fully considered and adjudged in favor of this answering defendant and against the said Rosewell E. Messinger by the said United States Circuit Court of Appeals for the Sixth Circuit.

This answering defendant further states and shows to the court that all of the matters and questions sought to be interposed and set up herein, have been determined and adjudged by a court of competent jurisdiction, to-wit: the United States Circuit Court of Appeals for the Sixth Circuit in favor of this answering defendant and against said Rosewell E. Messinger.

This answering defendant further states that in said cause of Peter Anderson vs. Rosewell E. Messenger, all of the questions of the superiority of title as between the said Rosewell E. Messinger and this answering defendant were submitted and considered and adjudged by the said United States Circuit Court of Appeals on the 5th day of June, 1906, in favor of this answering defendant and against the said Messinger and that thereafter, to-wit: on December 3, 1907, upon a second writ of error from said Circuit Court of Appeals, for the Sixth Circuit it was considered and adjudged that all of said questions were settled by said decisions and adjudication of June 5, 1906, and forever foreclosed. This defendant says that by reason of the several proceedings had in said United States Circuit Court the title to the property involved in this action has been adjudicated and determined and adjudged to be in this defendant and all parties hereto are estopped from denying and disputing the effect thereof.

PETER ANDERSON,
By C. A. THATCHER,
C. H. TRIMBLE,
R. P. CARY,
His Attorneys.

STATE OF OHIO,
Lucas County, ss:

271 Rhea P. Cary, being duly sworn, says that he is one of the attorneys for defendant Peter Anderson; that said defendant is a non-resident of and now absent from Lucas county, Ohio; that the allegations contained in the foregoing amendment are true as he verily believes.

RHEA P. CARY.

Subscribed and sworn to before me this the 7th day of March, 1908.

[SEAL.] CHARLES A. THATCHER,
Notary Public, Lucas County, Ohio.

Appearing at pp. 287-289 of said record.

On the 9th day of March, 1908, defendant, Peter Anderson, by his attorneys, filed in said Circuit Court an amendment to his answer to answer and cross-petition of Emily O. Butler in the

above entitled cause, which answer was afterwards refiled on the 10th day of March, 1908.

On the 10th day of March, 1908, defendant, Peter Anderson, by his attorneys, refiled in said Circuit Court, an amendment to his answer to the answer and cross-petition of Emily O. Butler, in the above entitled cause, which amendment to answer is in the words and figures as follows, to-wit:

In the Circuit Court of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al., Defendants.

Consolidated with

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSINGER et al., Defendants.

Amendment to the Answer of Peter Anderson to the Answer and Cross-petition of Emily O. Butler.

The defendant, Peter Anderson, by way of amendment to his answer to the answer and cross-petition of Emily O. Butler, heretofore filed herein, having first obtained leave of court to file said amendment, and reserving to himself all proper exceptions to the form of this action and objecting and protesting against the form of the action and the jurisdiction of this court over his person, and objecting to and protesting against the right of this court to pass upon and determine in this foreclosure proceeding, his title to the property described in the petition of the plaintiff herein and in the answer and cross-petition of Emily O. Butler, respectfully states and shows to the court that since the filing of his original answer
272 herein to said answer and cross-petition of Emily O. Butler, the ejectment suit of Peter Anderson vs. Rosewell E. Messinger, brought in said Circuit Court of the United States for the Northern District of Ohio, Western Division, and referred to in the answering defendant's said original answer, has been heard, considered and determined; that in said case were involved all the questions of the superiority of title as between this answering defendant and Rosewell E. Messinger and the said Emily O. Butler, and that all of said questions were submitted to the determination of said United States Circuit Court of Appeals, for the Sixth Circuit, and were by said court on June 5, 1906, and again on December 3, 1907, resolved, determined and adjudged against said Rosewell E. Messinger and in favor of this answering defendant and against said Emily O. Butler.

This answering defendant further states that in said case of Peter Anderson vs. Rosewell E. Messinger, the proper construction of the will of Henry Anderson, deceased, under which this answering de-

fendant claims title to the property involved herein and therein, was determined and adjudged in favor of this answering defendant, and that all the legal and equitable defenses set up and interposed by the said Rosewell E. Messinger in this action, and by any and all of his privies, were considered and determined and adjudged in favor of this answering defendant, and against the said Rosewell E. Messinger and Emily O. Butler. This defendant says that by reason of the several proceedings had in said United States courts the title to the property involved in this action has been adjudicated and determined and adjudged to be in this defendant and all parties hereto are estopped from denying and disputing the effect thereof.

PETER ANDERSON.
By C. A. THATCHER,
C. H. TRIMBLE,
R. P. CARY,
His Attorneys.

STATE OF OHIO,
Lucas County, ss:

Rhea P. Cary, being duly sworn, says that he is one of the attorneys for defendant Peter Anderson; that said defendant is a non-resident of and now absent from Lucas county, Ohio; that the allegations contained in the foregoing amendment are true as he verily believes.

RHEA P. CARY.

Subscribed and sworn to before me this 7th day of March, 1908.

[SEAL.] CHARLES A. THATCHER,
Notary Public, Lucas County, Ohio.

273 Appearing at pp. 289-291 of said record.

On the 9th day of March, 1908, defendant, Peter Anderson, by his attorneys, filed in said Circuit Court an amendment to his answer to amended and supplemental answer and cross-petition of Rosewell E. Messinger in the above entitled cause, which answer was afterwards refiled on the 10th day of March, 1908.

On the 10th day of March, 1908, defendant, Peter Anderson, by his attorneys, refiled in said Circuit Court, an amendment to his answer to the amended and supplemental answer and cross-petition of Rosewell E. Messinger in the above entitled cause, which amendment to his answer is in the words and figures as follows, to-wit:

In the Circuit Court of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al., Defendants.

Consolidated with

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSINGER et al., Defendants.

Amendment to the Answer of Peter Anderson to the Amended and Supplemental Answer and Cross-petition of Rosewell E. Messinger.

The defendant, Peter Anderson, by way of amendment to his answer to the amended and supplemental answer and cross-petition of Rosewell E. Messinger heretofore filed herein, having first obtained leave of court to file said amendment, and reserving to himself all proper exceptions to the form of this action and objecting and protesting against the form of the action and the jurisdiction of this court over his person, and objecting and protesting against the right of this court to pass upon and determine in this foreclosure proceeding, his title to the property described in the petition of the plaintiff herein and in the amended and supplemental answer and cross-petition of the said Rosewell E. Messinger filed herein, now states and shows to the court that in the case of Peter Anderson against Rosewell E. Messinger, in the Circuit Court of the United States, for the Northern District of Ohio, and in the Circuit Court of Appeals of the United States for the Sixth Circuit, referred to in defendant's original answer to said amended and supplemental answer and cross-petition of Rosewell E. Messinger, was subsequent to the filing of said original answer, heard, considered, and determined by the said
274 Circuit Court of Appeals of the United States for the Sixth Circuit. Said hearing having taken place on October 17, 1907, and said determination on December 3, 1907. This answering defendant further states and shows to the court that in said case and at said hearing all of the alleged legal and equitable defense set up and interposed by the amended and supplemental answer and cross-petition of the said Rosewell E. Messinger herein, were presented and urged in the said United States Circuit Court of Appeals and were considered and disallowed by said court in said action, and were on said 3rd day of December, 1907, determined and adjudged against the said Messinger and in favor of this answering defendant. This answering defendant further states and shows to the court that on the 5th day of June, 1906, in said case of Peter Anderson vs. Rosewell E. Messinger, all of the questions of the superiority of the title in and to the property involved therein and herein, were decided and adjudged in favor of this answering defendant and against the

said Rosewell E. Messinger, by the said United States Circuit Court of Appeals for the Sixth Circuit.

This answering defendant further states and shows to the court that said adjudication and decision of said United States Circuit Court of Appeals for the Sixth Circuit, rendered on June 5, 1906, was re-affirmed and held to be the law of that case by the said United States Circuit Court of Appeals on the 3rd day of December, 1907. This defendant says that by reason of the several proceedings had in said United States courts the title to the property involved in this action has been adjudicated and determined and adjudged to be in this defendant and all parties hereto are estopped from denying and disputing the effect thereof.

PETER ANDERSON,
By C. A. THATCHER,
C. H. TRIMBLE,
R. P. CARY,
His Attorneys.

STATE OF OHIO,
Lucas County, ss:

Rhea P. Cary, being duly sworn, says that he is one of the attorneys for defendant, Peter Anderson; that said defendant is a non-resident of and now absent from Lucas county, Ohio; that the allegations contained in the foregoing amendment are true as he verily believes.

RHEA P. CARY.

Subscribed and sworn to before me this the 7th day of March, 1908.

275 [SEAL.] CHARLES A. THATCHER,
Notary Public, Lucas County, Ohio.

Appearing at pp. 291-293 of said record.

On the 10th day of March, 1908, defendant, Peter Anderson, by his attorneys, filed in said Circuit Court a demurrer in the above entitled cause, which demurrer is in the words and figures as follows, to-wit:

In the Circuit Court of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al., Defendants.

Consolidated with

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSINGER et al., Defendants.

Demurrer.

Now comes the defendant, Peter Anderson, and protesting against the jurisdiction of this court over his person and over the subject-matter of this action and reserving to himself all rights as to said jurisdiction, files this his demurrer to the amended and supplemental answer and cross-petition of the defendant Rosewell E. Messinger on the following ground:

That said answer and cross-petition do not state facts sufficient to constitute a cause of action against this defendant.

PETER ANDERSON,
By R. P. CARY,
C. A. THATCHER,
C. H. TRIMBLE,
His Attorneys.

Appearing at pp. 293-294 of said record.

On the 11th day of March, 1908, defendant, Emily O. Butler, by her attorney, filed in said Circuit Court a reply to amendment to answer of Peter Anderson, etc., in the above entitled cause, which reply is in the words and figures as follows, to-wit:

Circuit Court, Lucas County, Ohio.

No. 2192.

UNITED STATES MORTGAGE AND TRUST COMPANY
vs.
PETER ANDERSON et al.

Reply of Emily O. Butler to the Amendment to the Answer of Peter Anderson to Her Answer and Cross-Petition.

276 For reply to the amendment to the answer of Peter Anderson to the answer and cross-petition of Emily O. Butler, said Emily O. Butler, says:

1. She was not a party to the record in the case of Anderson vs.

Messinger, in the United States Circuit Court, mentioned in said amendment, and therefore was not bound nor concluded by any proceedings had in said court in said suit.

2. That said suit has not been finally heard, considered and determined, but on the contrary said Circuit Court of Appeals, on June 5, 1906, as well as on December 3, 1907, simply reversed the judgment theretofore rendered by the United States Circuit Court, against said Peter Anderson, and remanded said case back to said Circuit Court for a new trial, upon any new issues that might be presented therein.

That since the reversal by said Circuit Court of Appeals, on December 3, 1907, amended pleadings, raising new issues have been filed in said case and it has not been retried.

That no final judgment has as yet been rendered in said action, and she further denies "that by reason of the several proceedings had in said United States Courts the title to the property involved in this action has been adjudicated and determined and adjudged to be in the defendant, Peter Anderson."

3. That said United States Courts had no power in said action, being one at law, to consider and determine the equitable title sought to be established by said Messinger, and therefore she denies that all the questions of the superiority of title as between the defendant Anderson and said Messinger and herself, were involved in said action.

4. She also denies all other statements in said amendment to said answer inconsistent with the foregoing averments.

Wherefore, this answering defendant asks for the relief heretofore prayed for in her reply to the original answer of said Messinger.

O. B. SNIDER,
Attorney for Defendant Butler.

STATE OF OHIO,
Lucas County, ss:

O. B. Snider being duly sworn, says Emily O. Butler is a non-resident of and now absent from the state of Ohio; that he is attorney in the above entitled action and that the facts stated in her foregoing reply are true, as he verily believes.

O. B. SNIDER.

277 Sworn to before me and signed in my presence this 11th day of March, 1908.

GEO. D. WELLES,
[SEAL.] *Notary Public, Lucas County, Ohio.*

Appearing at pp. 312-314 of said record.

On the 12th day of March, 1908, defendant and cross-petitioner, Rosewell E. Messinger, by his attorneys, filed in said Circuit Court, a reply in the above entitled cause, which reply is in the words and figures as follows, to-wit:

In the Circuit Court of Lucas County, State of Ohio.

No. 55794.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON et al., Defendants.

Consolidated with

No. 55795.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSINGER et al., Defendants.

Reply of the Defendant and Cross-Petitioner Rosewell E. Messinger to Amendment to Answer of the Defendant Peter Anderson.

Now comes the defendant and cross-petitioner, Rosewell E. Messinger, and for reply to the amendment to the answer of the defendant, Peter Anderson, to the amended and supplemental cross-petition of said defendant and cross-petitioner, Rosewell E. Messinger, admits that on or about October 17, 1907, the writ of error filed by said defendant, Peter Anderson, in the Circuit Court of Appeals of the United States, for the Sixth Circuit, in the action of ejectment brought by said defendant against said defendant and cross-petitioner, Rosewell E. Messinger, in the Circuit Court of the United States, for the Northern District of Ohio, Western Division, was heard before said Circuit Court of Appeals, and on or about December 3, 1907, said writ of error was decided in favor of said defendant, Peter Anderson; that thereafter an order was entered by said court reversing the judgment of said United States Circuit Court and awarding a new trial in said action; that said cause was thereupon duly remanded by said Circuit Court of Appeals to said United States Circuit Court for such new trial and for further proceedings therein,
according to law as justice might require; that thereupon said
278 cause was duly remanded to said United States Circuit Court; that thereupon said defendant and cross-petitioner, Rosewell E. Messinger, duly obtained leave from said United States Circuit Court to file an amended and supplemental answer in said action therein of Anderson vs. Messinger; and on or about February 21, 1908, duly filed an amended and supplemental answer in said action, setting forth therein in addition to the defense theretofore filed and interposed in said action, two separate defenses, viz:

First. As a second defense to said action, a final judgment of the Court of Common Pleas of Lucas county, Ohio, entered in cause No. 53,924 therein in an action of ejectment, wherein said defendant, Peter Anderson, was plaintiff, and this defendant and cross-petitioner, Rosewell E. Messinger, was one of the defendants, further al-

leging that the title of said defendant, Rosewell E. Messinger, to the real estate, the recovery of which is sought in said action of ejectment in said United States Circuit Court, and the title asserted thereto by said defendant, Peter Anderson respectively, are the same and are based upon the same facts as the title of this answering defendant and that asserted by said plaintiff, respectively, to the real estate, the recovery of which was sought in said action, No. 53,924, in said Court of Common Pleas of Lucas county, Ohio; and that said action in said United States Circuit Court involves the same questions of fact and law and substantially the same issues as were involved in said action in said State Court; and that said questions of facts and law and said issues were in said action each and all fully determined and finally adjudicated by said Court of Common Pleas of Lucas County, Ohio, against said Peter Anderson and in favor of said defendant, Rosewell E. Messinger, and that thereby the several causes of action set forth in the petition in the action of ejectment in said United States Circuit Court were fully determined and finally adjudicated against said Peter Anderson and in favor of said defendant, Rosewell E. Messenger, and that by reason thereof plaintiff was estopped and barred from asserting or maintaining any claim or title to or on account of the real estate described in said petition in said action of ejectment in said United States Circuit Court adverse or hostile to the interest therein and thereto of said defendant, Rosewell E. Messinger.

Second. As a third defense to said action, certain of the issues and proceedings and final judgment and decree of the Court of
279 Common Pleas of Lucas county, Ohio, entered in causes Nos. 55,794 and 55,795, therein being the actions now before this court upon appeal, and further alleging that said judgment and decree are in full force and effect; and that by reason thereof, said Peter Anderson is estopped, barred and enjoined from asserting or maintaining the several causes of action set forth in said petition in said action of ejectment pending in said United States Circuit Court.

Said defendant and cross-petitioner, Rosewell E. Messinger, further says that said final judgment and decree of said Court of Common Pleas of Lucas county, Ohio, duly entered at the April term, 1907, of said court in said consolidated causes Nos. 55,794 and 55,795 therein, by virtue of the statute of the state of Ohio, has ever since been and yet is in full force and effect.

Said defendant and cross-petitioner, Rosewell E. Messinger, further says that on or about the — day of October, 1906, this said Circuit Court of Lucas county, Ohio, heard a petition in error in proceeding No. 2,068 brought by said defendant, Peter Anderson, as plaintiff in error, against this defendant, Rosewell E. Messinger, and others, as defendants in error, to reverse said judgment of said Court of Common Pleas in said cause No. 53,924 entitled Peter Anderson, plaintiff, vs. The United Realty Company, et al., defendants; that in said proceeding in error, this court, on or about the 25th day of January, 1907, duly entered its judgment, in all things affirming said judgment of said Common Pleas Court, and that said judgment of said Court of Common Pleas remains and is in full force and effect.

This defendant and cross-petitioner, Rosewell E. Messinger, further says that since the filing of his amended and supplemental answer in said action of ejectment in said United States Circuit Court, said defendant, Peter Anderson, has filed a reply thereto; and that said action at law is pending upon the issues joined thereon in said United States Circuit Court and undecided and undetermined.

For further reply to said amendment to the answer of the defendant, Peter Anderson, the defendant and cross-petitioner, Rosewell E. Messinger, denies each and every other allegation therein contained not hereinabove expressly admitted or denied.

Wherefore, said defendant and cross-petitioner, Rosewell E. Messinger, prays for relief herein in accordance with his prayer in his amended and supplemental answer herein.

By KING & TRACY,
His Attorneys.

280 STATE OF OHIO,
Lucas County, ss:

Rosewell E. Messinger, being first sworn, upon his oath says that he is the defendant and cross-petitioner who files the foregoing reply, and that the facts stated therein are true, as he verily believes.

ROSEWELL E. MESSINGER.

Sworn to before me and subscribed in my presence this 12th day of March, 1908.

[SEAL.] GEO. D. WELLES,
Notary Public, Lucas County, Ohio.

Appearing at pp. 312-317 of said record.

On the 13th day of March, 1908, plaintiff by its attorney filed in said Circuit Court a demurrer in the above entitled cause, which demurrer is in the words and figures as follows, to-wit:

In the Circuit Court of Lucas County, Ohio.

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
PETER ANDERSON and Others.

Consolidated with

UNITED STATES MORTGAGE & TRUST COMPANY, Plaintiff,
vs.
ROSEWELL E. MESSENGER and Others, Defendants.

Demurrer of Plaintiff to the Amendment to the Answer of Peter Anderson.

The plaintiff demurs to the amendment to the answer of Peter Anderson, on the ground that it is insufficient in law.

B. A. HAYES,
Attorney for Plaintiff.

Appearing at p. 318 of said record.

On the 4th day of April, 1908, being the 52nd day of the January term, 1908, a decree in said cause was rendered, an entry of which appears on the journal of said court in the words and figures as follows, to-wit:

281 C. C. No. 2192, C. P. No. 55794.

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
PETER ANDERSON, ROSEWELL E. MESSINGER, ROSEWELL E. Messinger, Trustee for Charles Ruel Messinger; Estelle P. Messinger, Emily O. Butler, Jacob Ramser, Barbara Ramser, George W. Ruhl, Charles A. Ruhl, Henry B. Ruhl, Anna Ruhl, Henry Truesdall, William J. Frasch, Trustee; Francis P. Chapin, Rudloph A. Bartley, Harry R. Fowler, Chester D. Clapp, Catherine Zaraick, Robert Raitz, John J. Winsor, Frederick J. Klussman, Charles E. Stafford, John H. Serrels, The Detroit & Tennessee Realty Company, The Marine Cooks and Stewards' Union, The Marine Firemen, Oilers & Water Tenders' Benevolent Association of the Great Lakes, The Naval Reserves, Sick & Accident Association of Toledo, The Hygienic Toothpick Company, The Grasser-Brand Brewing Company, The Heubner-Toledo Breweries Company, John Ramser, Emma E. Andres and *and* Frieda Barbara Schneider.

C. C. No. 2193, C. P. No. 55795.

Consolidated with

UNITED STATES MORTGAGE & TRUST COMPANY
vs.
ROSEWELL E. MESSINGER et al.

The above entitled action having heretofore been duly consolidated by an order duly entered by consent in the Court of Common Pleas of Lucas county, Ohio, on March 9, 1908, came regularly on for trial upon appeal by the defendant, Peter Anderson, from the decree entered therein by said Common Pleas Court, the plaintiff, United States Mortgage & Trust Company, the defendant, Peter Anderson, and the defendants and cross-petitioners, Emily O. Butler, and Rosewell E. Messinger, each appearing by their respective attorneys.

282 Thereupon on motion of the defendant, Peter Anderson, he was granted leave to file an amendment to his several answers heretofore filed herein, to which the plaintiff, United States Mortgage & Trust Company, and the defendants and cross-petitioners, Emily O. Butler and Rosewell E. Messinger, each severally objected and excepted.

Thereupon came on for hearing the motion of the defendant, Peter Anderson, to stay further proceedings herein and to dismiss the proceedings which motion was duly argued and submitted, and the court on consideration denied said motion, to which ruling the defendant, Peter Anderson, excepted.

Thereupon the defendant, Peter Anderson, orally moved the court for leave to file a supplement and amendment to his several answers herein, setting forth therein the substance of said motion to stay further proceedings herein and to dismiss said proceedings, and said motion was duly argued and submitted, and the court on consideration denied said motion, to which ruling the defendant, Peter Anderson, excepted.

Thereupon the defendant, Peter Anderson, moved the court for leave to file an amendment to his answer to the amended and supplemental answer of the defendant and cross-petitioner, Rosewell E. Messinger, setting up the statutes of limitations; and said motion was duly argued and submitted; and the court, on consideration, denied same, to which ruling the defendant, Peter Anderson, excepted.

Thereupon, on motion of the defendant, Peter Anderson, he was granted leave to withdraw all of the answers and the amendments thereto heretofore filed by him herein to the petition of the plaintiff, United States Mortgage and Trust Company, and to the answer and cross-petition of the defendant and cross-petitioner, Emily O. Butler, and to submit the separate demurrers to said petition and to said answer and cross-petition heretofore filed herein in the Court of Common Pleas, to which the plaintiff, United States Mortgage & Trust Company, and the defendant and cross-petitioner, Emily O. Butler, severally objected and excepted.

And thereupon said demurrers were duly argued by counsel and submitted to the court and the court being fully advised in the premises on consideration overruled each of said demurrers, to which said defendant, Peter Anderson, excepted.

Thereupon on motion therefor, the defendant Peter Anderson, was granted leave to re-file the answer and the amendment
283 thereto originally filed by him in the Court of Common Pleas to the petition of the plaintiff, and the amendment to said answer filed in this court, and the answer and amendment thereto originally filed by him in the Court of Common Pleas to the answer and cross-petition of the defendant and cross-petitioner Emily O. Butler, and the amendment to said answer filed in this court; the several replies to the pleadings of said defendant, Peter Anderson, filed by the plaintiff and said defendant and cross-petitioner, respectively, in the Court of Common Pleas, to be regarded as re-filed herein; and on March 11, 1908, the plaintiff, United States Mortgage & Trust Company, filed its demurrer to said amended answer of the defendant, Peter Anderson, filed in this court, and the defendant and cross-petitioner, Emily O. Butler, filed her reply thereto.

And thereupon the demurrer of the plaintiff, United States Mortgage and Trust Company, to the amended answer of the defendant Peter Anderson, filed in this court, was duly argued by counsel and submitted to the court; and the court being fully advised in the premises, on consideration sustained said demurrer, to which ruling the defendant, Peter Anderson, excepted.

Thereupon the defendant, Peter Anderson, orally moved the court for leave to withdraw all of the answers and the amendments

thereto heretofore filed by him herein to the amended and supplemental answers and cross-petitions of the defendant and cross-petitioner, Rosewell E. Messinger, and to file a demurrer to said amended and supplemental answers and cross-petitions based upon the general and special grounds; and said motion was duly argued and submitted, and the court on consideration denied said motion, to which ruling the defendant, Peter Anderson, excepted.

Thereupon the defendant, Peter Anderson, orally moved the court for leave to withdraw all answers and the amendments thereto heretofore filed by him to the amended and supplemental answers and cross-petitions of the defendant and cross-petitioner, Rosewell E. Messinger, and to file a general demurrer to said amended and supplemental answer and cross-petitions; and said motion was duly argued and submitted, and the court on consideration granted said motion; and thereupon the defendant, Peter Anderson, filed said general demurrer to said pleadings, which demurrer was thereupon duly argued by counsel and submitted to the court; and the court being fully advised in the premises, on consideration, overruled said demurrer to said amended and supplemental answers, and
284 cross-petitions of said defendant and cross-petitioner Rosewell E. Messinger, to which ruling the defendant, Peter Anderson, excepted.

Thereupon, on motion therefor, the defendant, Peter Anderson, was granted leave to refile the answers and the amendments thereto originally filed, by him in the Court of Common Pleas, to the amended and supplemental answers and cross-petitions of the defendant and cross-petitioner, Rosewell E. Messinger and the amendment to said answers, filed in this court, the several replies to the pleadings of said defendant, Peter Anderson filed by said defendant and cross-petitioner, Rosewell E. Messinger, in the Court of Common Pleas to be regarded as refiled herein; and on March 11, 1908, said defendant and cross-petitioner, Rosewell E. Messinger filed a reply to said amended answer of said defendant, Peter Anderson, filed in this court.

Thereupon the defendant, Peter Anderson, demanded a jury for the trial of said issues joined, which demand was denied, to which action of the court said defendant, Peter Anderson, excepted.

And thereupon said consolidated actions were heard by, and on March 13, 1908, were submitted to the court upon the issues joined upon the pleadings in said actions between the plaintiff, United States Mortgage & Trust Company, and the defendants, Emily O. Butler and Peter Anderson, said defendant, Peter Anderson, duly objecting and excepting to the hearing and submission of said issues as to other than certain parts of lots nineteen (19) and twenty-one (21) in the Vistula division of the city of Toledo, Lucas county, Ohio, hereinafter described; and said actions were also heard by and submitted to the court upon the issues joined upon the pleadings in said actions between the plaintiff, United States Mortgage & Trust Company, and the defendants, Emily O. Butler, Rosewell E. Messinger and Peter Anderson, so far as same relate to said certain parts of lots nineteen (19) and twenty-one (21) hereinafter described;

and the court orders that this decree be now entered as to said parts of said lots.

And thereupon it duly appearing to the court, and the court finding that upon precipe therefor of the defendant and cross-petitioner, Rosewell E. Messinger, the plaintiff, and each and all of said defendants to said respective actions, other than said defendant, Rosewell E. Messinger, have each been duly personally served with summons or by publication therein; and said consolidated action, having been duly heard by and submitted to the court upon the issues joined by the pleadings filed therein by the defendant and cross-
285 petitioner, Rosewell E. Messinger, and the defendant, Peter Anderson, with respect to parts of lots nineteen (19) and twenty-one (21) in the Vistula division of the city of Toledo, Lucas county, Ohio, only which premises are hereinafter specifically described, and upon the evidence duly produced and offered before said court thereon, the court finds upon said issues from said evidence against said defendant, Peter Anderson, and in favor of said defendant and cross-petitioner, Rosewell E. Messinger, that each and all of the allegations in the said amended and supplemental answers and cross-petitions of the defendant, Rosewell E. Messinger, with respect to said parts of said lots hereafter described are true, and the equities upon said issues joined, so far as same relate to said parts of said lots, are with said defendant and cross-petitioner, Rosewell E. Messinger, and against said defendant, Peter Anderson.

The court further finds that said defendant, Peter Anderson, has in equity no claim, right, title, estate or interest whatsoever in or to the following part of said premises described in said pleadings in said actions, and being the part thereof hereinabove referred to, viz:

All of lot nineteen (19) in the Vistula division of the city of Toledo, Lucas county, Ohio, except the southwest nineteen (19) feet of the southwest eighty (80) feet thereof, and the improvements, privileges and appurtenances thereunto belonging; said premises having a frontage of fourteen (14) feet on Lynn street, and extending northeasterly therefrom at a like width to a depth of eighty (80) feet.

The southeast nineteen (19) feet of the southwest eighty (80) feet of lot twenty-one (21) in the Vistula division of the city of Toledo, Lucas county, Ohio, and the improvements, privileges and appurtenances thereunto belonging, said premises having a frontage of nineteen (19) feet on Lynn street and extending northeasterly therefrom at a like width to a depth of eighty (80) feet.

And the court further finds that said defendant and cross-petitioner, Rosewell E. Messinger, is in equity the owner in fee simple of said above described property and is entitled to have his title thereto quieted as against said defendant, Peter Anderson and to have a release, discharge and conveyance from the defendant, Peter Anderson, of any and all estate, claim interest, lien or title which he has or claims to have in, to or against said above described premises; that a certain instrument executed by Edson Allen, master commissioner, to Henry Anderson, dated November 18, 1844, and

recorded in volume 10 at page 168 and following of the
286 records of deeds of Lucas county, Ohio, was in fact, as to Charles Butler, who was then the owner of said above described property, a mortgage, and such title as said Henry Anderson took to said property by virtue of said instrument was taken and held by him in trust as security for the payment of the indebtedness evidenced by note dated July 1, 1841, for $20,000.00 described in the amended and supplemental answers and cross-petitions of the defendant and cross-petitioner, Rosewell E. Messinger, then owing by said Charles Butler to said Henry Anderson, and for no other purpose; and that thereafter said Charles Butler duly paid to said Henry Anderson, and to the executors of his said estate, said debt in full, and that said executors of Henry Anderson duly released and discharged said Charles Butler from any and all claims which the estate of said Henry Anderson had theretofore held against him, and conveyed all of the title theretofore held by said Henry Anderson, and by them as his said executors, in and to said property, to the said Charles Butler, and forever released and discharged said Charles Butler from any and all debts, claims and demands of ever- kind which said Henry Anderson or his said executors theretofore held or owned against said Charles Butler.

To each and all of which findings said defendant, Peter Anderson duly excepted.

And it is therefore hereby ordered, adjudged and decreed that within three (3) days from the entry hereof said defendant, Peter Anderson, shall execute and deliver to said defendant and cross-petitioner, Rosewell E. Messinger, a proper deed of release and quit claim of any and all such claims, interest, lien or title of the said defendant, Peter Anderson, in or to said above described premises, and each and every part thereof, and the improvements, privileges and appurtenances thereunto belonging, and that in default of said defendant, Peter Anderson, so executing and delivering such deed within the time last aforesaid, this decree shall operate as such conveyance; and the title of said defendant and cross-petitioner, Rosewell E. Messinger, to said above described parts of said lots nineteen (19) and twenty-one (21) in the Vistula division of the city of Toledo, Lucas county, Ohio, is hereby quieted as against said defendant, Peter Anderson, and any and all persons claiming under him, and said defendant, Peter Anderson, is hereby barred and forever enjoined from setting up, asserting or claiming any claim, interest, lien, right, title or estate in or to said premises, or any part thereof.

287 To which decision, decree and orders, and to each and every part thereof, said defendant, Peter Anderson, duly excepted.

It is further ordered, adjudged and decreed and considered by the court that said defendant and cross-petitioner, Rosewell E. Messinger, have and recover from the defendant, Peter Anderson, the costs incurred by said cross-petitioner upon the issues joined between said cross-petitioner and said defendant, and that the defendant, Peter Anderson, pay to the clerk of this court, the costs incurred

by him herein in the Court of Common Pleas and in this court, and that execution issue therefor; to which order, decree and judgment, and to each and every part thereof, said defendant, Peter Anderson, duly excepted.

And it is further ordered that the matters in controversy herein between said defendant and cross-petitioner, Rosewell E. Messinger, and the defendant, Peter Anderson, with respect to that part of the premises described in the pleadings filed herein by said parties other than the above specifically described parts of lots nineteen (19) and twenty-one (21) in the Vistula division of the city of Toledo, Lucas county, Ohio, be and are hereby reserved by the court for further hearing consideration and decision; with leave to any of the parties hereto to make such further application to the court herein for the due protection and preservation of their rights therein as may be necessary.

And it is further ordered by the court that the foregoing decree shall not affect the several liens of the plaintiff, United States Mortgage and Trust Company, and the defendant and cross-petitioner, Emily O. Butler, respectively, against any of the property described in the pleadings filed in said consolidated actions by said parties, to which order, and each and every part thereof, the defendant, Peter Anderson, duly excepted.

Appearing at pp. 326-333 of said record.

Thereupon the defendant, further to maintain the issues upon his part, offered and read in evidence duly certified copy of writ of execution issued May 6, 1907, in cause No. 55,794 in the Common Pleas Court of Lucas county, Ohio, entitled United States Mortgage & Trust Company, plaintiff, vs. Peter Anderson, Rosewell E. Messinger et al., defendants and the sheriff's proceedings and return thereon; and same was received in evidence and is hereto attached, marked "Exhibit G," and hereby made part of this bill of exceptions, being in words and figures as follows:

"The State of Ohio,
Lucas County:

288 To the Sheriff of Lucas County, Greeting:

We command you, that of the goods and chattels in your county of Rosewell E. Messinger, you cause to be made the sum of fifty-one hundred and sixty and 72 100 dollars ($5,160.72) with interest thereon from the 1st day of April, 1907, at the rate of 6 per cent. per annum, which Emily O. Butler, by the judgment of the Court of Common Pleas of the state of Ohio, in and for the county of Lucas, at a term thereof began and held on the 1st day of April, A. D. 1907, recovered against the said Rosewell E. Messinger for fifty-one hundred fifty-two and 55/100 ($5,152.55) dollars damages and eight and 17/100 dollars ($8.17) costs of suit, and the increased costs endorsed hereon, and the costs that may accrue on this writ; and for want of goods and chattels, that you cause the same to be made of the lands and tenements in your county of the said

Rosewell E. Messinger and that you make due return of this writ to said Court of Common Pleas, with your proceedings hereon written, within sixty days from the date hereof.

Witness, Ed. L. Kimes, clerk of said court, and the seal thereof affixed at Toledo, this 6th day of May, A. D., 1907.

[SEAL.] ED. L. KIMES, *Clerk.*
By E. E. BREED, *Deputy.*

Sheriff's Return.

Received this writ May 6, 1907, and there being no goods or chattels belonging to the within named defendant Rosewell E. Messinger found by me in Lucas county, Ohio, on which to levy, I forthwith levied on the following described lands and tenements, to-wit: Lots numbers twenty (20), twenty-one (21), except the southeast nineteen (19) feet of the southwest eighty (80) feet thereof, thirty (30), thirty-one (31), thirty-two (32), one thousand and eight (1,008) and one thousand and nine (1,009), all in the Vistula division of Toledo, Lucas county, Ohio. Nothing further being done by me this writ is hereby returned.

S. B. CHAMBERS, *Sheriff.*
By J. C. NEWTON, *Deputy.*

Filed May 6, 1907.

ED. L. KIMES, *Clerk.*"

Thereupon it was agreed by and between counsel for the respective parties to this action, that no objection would be made to the form of certification of said writ of execution and sheriff's return and proceedings thereon.

At the times same were offered, the plaintiff objected separately and severally to the introduction of each and every part of each of the foregoing records in said cases of Peter Anderson vs. The United Realty Company, et al., in the Common Pleas and
289 Circuit Courts of Lucas county, Ohio, and United States Mortgage & Trust Company vs. Peter Anderson, et al., and United States Mortgage & Trust Company, vs. Rosewell E. Messinger, et al., in said Common Pleas and Circuit Courts of Lucas county, Ohio, upon the grounds of incompetency, immateriality and irrelevancy.

Each of said objections was by the court overruled, to which action of the court the plaintiff excepted.

Thereupon the defendant, further to maintain the issues upon his part, offered and read in evidence duly certified copy of deed from James H. Anderson and wife to Charles Butler, dated April 7, 1860, together with the certificate of acknowledgment attached thereto, the endorsements thereon and certificate of the county recorder of Lucas county, Ohio, attached thereto, and same were received in evidence; said deed, certificate and endorsements being in words and figures as follows:

"This indenture, made the seventh day of April in the year one thousand eight hundred and sixty, between James H. Anderson, of Austin, Tunica county, in the state of Mississippi (late of Holly Springs in said state), and Lida C., his wife, of the first part, and Charles Butler, of the city of New York, of the second part witnesseth that the said party of the first part, for and in consideration of the sum of one dollar (and other considerations) lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have remised, released and quitclaimed and by these presents do remise, release and quitclaim unto the said party of the second part, and to his heirs and assigns forever, all those certain lots or parcels of land situate, lying and being in the Vistula division of the city of Toledo, county of Lucas, state of Ohio, known and designated as lots numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1,008), one thousand and nine (1,009), thirty (30), thirty-one (31), thirty-three (33), thirty-four (34), one thousand (1,000), one thousand and one (1,001), said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street, also Water lot number nine hundred and ninety-two (992) extending from Water street to the line of wharfing and fronting on the Miami river one hundred and seventy-six feet and sixty-five hundredths of a foot. Also town lots in the Port Lawrence division of said city of Toledo numbered one hundred and eighty-five (185), one hundred and seventy-six
290 (176), one hundred and eighty-eight (188), two hundred and ninety-eight (298), one hundred and fifty-seven (157), forty-eight (48), two hundred and forty-six (246), two hundred and sixty-two (262), two hundred and eighty-six (286), three hundred and four (304), three hundred and thirty-one (332), three hundred and thirty-three (333), three hundred and thirty-six (336), three hundred and thirty-seven (337), and three hundred and thirty-eight as the same were laid out and numbered on the recorded map of said city; being the same premises conveyed by Edson Allen, master commissioner in chancery to Henry Anderson by deed dated the eighteenth of November, one thousand eight hundred and forty-four. Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also, all the estate, right, title, interest, dower, property, possession, claim and demand

whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances to have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, his heirs and assigns forever.

"In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JAMES H. ANDERSON. [L. S.]
LIDA G. ANDERSON. [L. S.]

"Sealed and delivered in the presence of

Q. GOODMAN.
B. W. WATTHALL.

"Printed word 'fifty' erased word 'sixty' inserted.

"THE STATE OF MISSISSIPPI,
Marshall County:

"Personally appeared before me, A. W. Goodrich, an acting justice of the peace and ex-officio notary public in and for said county, the within named James H. Anderson and Lida G. Anderson, his wife, who severally acknowledged that they signed, sealed and delivered the within deed on the day and year therein mentioned as their act and deed—the said Lida G. Anderson on a private examination, separate and apart from her said husband acknowledged that she signed and sealed and delivered said deed as her voluntary act and deed freely without any fear, threats or compulsion of her said husband.

In testimony whereof I have hereunto set my hand and affixed the notarial seal this the 16th day of April, A. D., 1860.

[SEAL.] A. W. GOODRICH.
291 *J. P. & Ex-Officio, Notary Public.*

Endorsed: James H. Anderson and wife to Charles Butler, dated 7th April, 1860. Quit-claim deed. Recorded office, Lucas county, received for record May 2nd-60 and recorded May 3rd, 1860, in volume 34 of deeds, pages 114 and 115. Jonathan Wynn, Recorder.

"UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

"I, Thos. H. Barkdull, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed recorded in volume 34, of the record of deeds of said Lucas county, at pages 114 and 115, which said record of deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such county recorder.

"In testimony whereof, I have hereunto set my name and affixed my official seal at Toledo, in said county, this 29th day of April, A. D., 1905.

(Signed) THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio."

Thereupon the defendant, further to maintain the issues upon his part, offered and read in evidence duly certified copy of deed from Charles Butler and wife to Calvin Bronson, dated April 23, 1860, together with the certificate of acknowledgment attached thereto, the endorsements thereon and certificate of the county recorder of Lucas county, Ohio, attached thereto, and same were received in evidence; said deed, certificates and endorsements being in words and figures as follows:

"Charles Butler and wife
to
Calvin Bronson.

Deed.

"Know all men by these presents, that I, Charles Butler of the city, county and state of New York, in consideration of the sum of seventeen thousand and five hundred dollars to me paid by Calvin Bronson of the city of Toledo, in the county of Lucas and state of Ohio, the receipt whereof is hereby acknowledged, do hereby bargain, sell and convey unto the said Calvin Bronson and his heirs and assigns forever, the following described real estate, situate in county of Lucas and state of Ohio, to-wit: Lots Nos. one thousand and — (1,008), one thousand and nine (1,009), thirty (30), thirty-one (31), thirty-three (33), thirty-four (34), one thousand (1,000), one thousand and one (1,001), eighteen (18), nineteen (19), twenty (20), and twenty-one (21), in the Vistula division of the city of Toledo as numbered and designated on the Gower map (so-called), of said city on file in the recorder's office of Lucas county, Ohio, being the entire block of land lying within the boundary of Summit, Cherry, Water and Lynn streets, in said Vistula di-
292 vision of Toledo, saving however, and excepting and reserving from the above described premises, all rights which the Western Seaman's Friend Society have in and to sixty (60) feet front on Lynn street being thirty feet each side of the center of the Bethel church, as said church now stands and extending back the same width to a point eighty feet from the northwesterly line of said Lynn street; the said Western Seamans Friend Society now being in the occupation of said premises by virtue of an agreement on the part of me, the said Charles Butler to donate the same to said society as a building site for a Bethel church to be used and occupied by said society for Bethel church purposes and no other, together with all the privileges and appurtenances to the same belonging.

"To have and to hold the same unto the said Calvin Bronson and

his heirs and assigns forever, hereby covenanting that the title so conveyed is clear, free and unincumbered except by the claim of the Western Seaman's Friend Society as aforesaid, and that I will warrant and defend the same against all claims whatsoever, except said claim of the Western Seaman's Friend Society, and all claims for taxes and assessments levied or assessed on said premises since the twenty-sixth day of December, A. D., 1859, and I, Eliza A. Butler, wife of the said Charles Butler, in consideration of one dollar to me in hand paid to remise, release and forever quit-claim unto the said grantee all my right by way of dower or otherwise in and to the above granted tenements.

"In witness whereof, we the said Charles Butler and Eliza A. Butler, hereunto set our hands and seals this twenty-third day of April in the year eighteen hundred and sixty.

[SEAL.] CHARLES BUTLER.
[SEAL.] ELIZA A. BUTLER.

"Signed, sealed and delivered in presence of

E. ANNIE BUTLER.
SAM T. BULL.

"THE STATE OF NEW YORK,
New York City and County, ss:

"On this twenty-third day of April, A. D., 1860, before me the subscriber a commissioner for the state of Ohio duly commissioned and sworn, dwelling in the city of New York personally appeared Charles Butler and Eliza A. Butler the grantors in the above conveyance and acknowledged the same to be their voluntary act and deed for the uses and purposes therein mentioned. And the said Eliza A. Butler, wife of the said Charles Butler, being examined by me separate and apart from her said husband and the
293 contents of said deed made known and explained to her, did declare that she did voluntarily sign, seal and acknowledge the same and that she was still satisfied therewith as her act and deed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal on the day and year last aforesaid.

[SEAL.] SAM T. BULL,
Commissioner for the State of Ohio.

"Transferred May 2, 1860.

ALEX. READ,
County Auditor."

"Received for record May 2, 1860, and recorded May 3, 1860, Volume 34 of deeds, pages 116 and 117.

JOHNATHAN WYNN, *Recorder.*

"UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

"I, Thos. H. Barkdull, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a

true, perfect and complete copy of the record of a certain deed, recorded in volume 34, of the record of deeds of said Lucas county, at page 116, which said record *and* deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such county recorder.

"In testimony whereof, I have hereunto set my name and affixed my official seal at Toledo, in said county, this 29th day of April, A. D., 1905.

(Signed) THOS. H. BARKDULL.
County Recorder of Lucas County, Ohio.

Thereupon the defendant, further to maintain the issues upon his part, offered and read in evidence section 13 of stipulation No. 1, and same was received in evidence being in words and figures as follows:

"That on the 23rd day of April, A. D., 1860, said Charles Butler of the city and state of New York, in consideration of seventeen thousand five hundred dollars ($17,500.00) paid by Calvin Bronson, of Toledo, Ohio, to said Butler, signed, sealed, acknowledged and delivered a warranty deed to said Bronson, and by it did duly grant, bargain, sell and convey, so far as he was able to said Calvin Bronson, his heirs and assigns forever, all of the real estate involved in this action, and that there is a regularly executed chain of conveyances and transfers from the said Calvin Bronson down to the defendant, Rosewell Messinger, and that all the right, title and interest of the said Calvin Bronson in his lifetime in any way acquired in or to the real estate involved in this action was at the commencement of this action held and is now held and owned
294 by the defendant, the said Rosewell Messinger, the grandson of said Bronson."

Thereupon the defendant, further to maintain the issues upon his part, offered and read in evidence section 14 of stipulation No. 1, and same was received in evidence, being in words and figures as follows:

"That after the said Calvin Bronson received his said deed from said Charles Butler, and in the month of June, A. D., 1860 he entered upon the real estate involved in this action claiming under his said deed, and in the month of June, 1860, commenced the erection of a tobacco factory on said premises and erected thereon large and valuable buildings, which are now on said premises, and that the defendant, Rosewell Messinger, the grandson of said Calvin Bronson, after the death of his grandfather, erected other large and expensive buildings, all of which are now on said premises."

Thereupon the defendant, further to maintain the issues upon his part, offered and read in evidence section 16 of stipulation No. 1, and same was received in evidence, being in words and figures as follows:

"That the said defendant, Rosewell Messinger, and his grandfather, Calvin Bronson, under whom he claims, have been in the open, notorious and continued possession of all of said premises since the first day of June, A. D., 1860, claiming said premises under

said deed to the said Calvin Bronson from the said Charles Butler, and that said Calvin Bronson and defendant Messinger have paid the taxes and assessments levied on said premises ever since and including the year, A. D., 1860."

Thereupon the defendant further to maintain the issues upon his part, offered and the court received in evidence stipulation of counsel for the respective parties hereto then made in open court, that the date of the probate of the will of Henry Anderson in Lucas county, Ohio, was April 20, 1860.

Thereupon the defendant produced from the agreed custodian of the books, documents, and papers of Charles Butler, deceased, and offered and read, and the court received in evidence the following documents:

1. An account stated and receipt written below, in words and figures as follows:

"Statement of Note to Henry Anderson.

October 1, 1852.

	1 July, 1841, note for	$20,000.00	
295	Inst. to 1 Oct., 1855, 11 yrs., 3 mos., 6 per cent	13,500.00	
			$33,500.00
	Cr.		
	1 June, 1848, ½ of ac. coms. (11,934.97)	$5,967.49	
	Inst. to 1 Oct., '52, 4 yrs. 4 mos.	1,551.42	
	1 June, 1852, ½ of ac. (624.31)	312.15	
	Inst. 4 mos.	6.24	
		$7,837.30	
	Less ½ of coms. refunded on sales canceled and inst.	312.24	
			$7,525.06
	1 Oct., 1849, cash paid	3,376.52	
	Inst. to Oct. 1, 1852, 3 yrs.	607.86	
			3,984.38
	1 Oct., 1850, cash paid	2,700.00	
	Inst. to 1 Oct., 1852, 2 yrs.	324.00	
			3,024.00
	1 Oct., 1851, cash paid	3,110.00	
	Inst. to 1 Oct., 1852, 1 yr.	186.60	
			3,296.60
			$17,830.04
	Leaving due 1 October, 1852		$15,669.96

E. E.

CHARLES BUTLER,
W. H. GOODMAN,
Executors of H. Anderson, Deceased.

"1669.96. NEW YORK, *Sept.* 27, 1852.

Received of Charles Butler sixteen hundred, sixty-nine 96-100 dollars on his note to H. Anderson, this 1 Oct., 1852.

(Signed) W. GOODMAN,
Executor of H. Anderson, Deceased."

2. A note in words and figures as follows:

7,340 dols. OCT. 1, 1853.

296 "For value received, I promise to pay to the order of W. Goodman and P. Anderson, trustees and executors of the estate of Henry Anderson, deceased, seven thousand, three hundred and forty dollars, with interest, on or before the first of December next, and the payment of $73.40 as of 1 Oct., 1853, to be endorsed on my note due the estate of H. Anderson.

(Signed) CHARLES BUTLER,
By S. H. FLEETWOOD,
His Attorney."

3. The endorsement upon said note as follows:

"Pay —— ——. (Signed) Walter Goodman, P. Anderson, Executors and trustees of the estate of H. Anderson."

Thereupon the defendant, further to maintain the issues upon his part, offered and read, and the court received in evidence the following admission:

It was admitted by both parties in open court, the plaintiff objecting to the competency, relevancy and materiality of the same, which objection was overruled by the court, to which plaintiff duly excepted, that the annual accounts and reports of the executors of the will and trustees of the estate of Henry Anderson, filed in the probate court of Marshall county, Mississippi, show the following (and other) payments by Charles Butler to said executors and trustees upon the $20,000.00 note dated July 1, 1841, executed by Charles Butler to Henry Anderson:

May 4, 1855, 9th report	$3,000.00
October 30, 1855, paid on principal 10th report	4,340.00
October 30, 1855, paid interest, 10th report	1,027.60

Thereupon the defendant, further to maintain the issues upon his part, offered and read, and the court received in evidence duly certified copy of deed from P. Anderson and W. Goodman, executors and trustees, to Charles Butler, dated April 1, 1855, together with certificate of acknowledgment attached thereto, the endorsements thereon and certificate of the county recorder of Lucas county, Ohio, and said deed, certificates and endorsements were received in evidence, being in words and figures as follows:

This indenture, made the first day of October, in the year of our Lord one thousand eight hundred and fifty-five, between Peter

Anderson and Walter Goodman, both of Holly Springs in the state of Mississippi, trustees and executors under the last will and testament of Henry Anderson, late of Holly Springs in said state, deceased, of the first part, and Charles Butler of the city of New York, in the state of New York of the second part. Wit-
297 nesseth, that the said parties of the — part, by virtue of the power and authority to them given in and by the said last will and testament, and for and in consideration of the sum of one dollar (and other considerations) lawful money of the United States of America, to them in hand paid, at or before the ensealing and delivery of these presents by the said party of the second part, the receipt thereof is hereby acknowledged, and the said party of the second part, his heirs and assigns forever, released and discharged from the same by these presents, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by this presents do grant, bargain, sell alien, release, convey and confirm unto the said party of the second part, his assigns forever. All those certain lots or parcels of land lying and being in the Vistula division of the city of Toledo, county of Lucas, state of Ohio, known "as" designated as lots numbers eighteen (18) nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1,008), one thousand and nine (1,009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand (1,000), one thousand and one (1,001) said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street, also Water lot number nine hundred and ninety-two (992), extending from Water street to the line of wharfing and fronting on the Miami river one hundred and seventy-six feet and sixty-five hundredths of a foot, also town lots in the Port Lawrence division of said city of Toledo, numbered one hundred and eighty-five (185), one hundred and seventy-six (176), one hundred and eighty-eight (188), two hundred and ninety-eight (298) one hundred and fifty-seven (157), forty-eight (48), two hundred and forty-six (246), two hundred and sixty-two (262), two hundred and eighty-six (286), three hundred and four (304), three hundred and thirty-two (332), three hundred and thirty-three (333), three hundred and thirty-six (336), three hundred and thirty-seven (337), and three hundred and thirty-eight (338), as the same were laid out and numbered on the recorded map of said city, being the same premises conveyed by Edson Allen, master commissioner in chancery, to Henry Anderson by deed dated the eighteenth November, one thousand and eight hundred and forty-four.

Together with all and singular the edifices, buildings, rights, members, privileges, advantages, hereditaments and appurtenances to the same belonging, or in any wise appertaining; and the rever-
sion and reversions, remainder and remainders, rents, issues
298 and profits thereof. And also the estate, right, title, interest claim and demand whatsoever, both in law and equity, which the said testator had in his lifetime, and at the time of his decease, and which the said parties of the first part, or either of them have or hath, by virtue of the said last will and testament, or

otherwise, of, in and to the same, and every part and parcel thereof, with the appurtenances; to have and to hold the said premises above mentioned and described, and hereby granted and conveyed, or intended so to be, with the appurtenances, "*under*" the said party of the second part, his heirs and assigns, to his and their only proper use benefit and behoof forever. It being understood the above described premises were conveyed to Henry Anderson in fee but held by him in his lifetime as a mortgage to secure the payment of a certain sum of money due from Charles Butler to Henry Anderson, which fact, after his death was duly acknowledged under seal of William Anderson and James H. Anderson, his only heirs at law; said parties of the first part covenant, grant, promise and agree to and with the said party of the second part, his heirs and assigns, that the said party of the second part, his heirs and assigns, shall and lawfully may from time to time, and at all times forever hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy, all and singular the said hereditaments and premises hereby granted and conveyed or intended so to be, with their and every of their appurtenances and receive, and take the rents, issues and profits thereof, to and for his and their own use and benefit, without any lawful let, suit, hindering, molestation, interruption, or denial whatsoever, of, from or by them, the said parties of the first part, or their assigns; or, of, from or by any other person or persons whomsoever lawfully claiming, or who shall or may lawfully claim hereafter, by, from or under them or either of them, or by, from or under their heirs or assigns, any rights, title, interest or estate; and that free and clear and freely and clearly discharged, acquitted and exonerated, or otherwise well and sufficiently saved, defended, kept harmless and indemnified by them, the said parties of the first part, their heirs and assigns, of, from and against all and all manner of former and other gifts, grants, bargains, sales, mortgages, judgment and all other charges and incumbrances whatsoever, had, made, committed, executed or done by them, the said parties of the first part, or by, through, or with their acts, deeds, means, consent, procurement or privity.

In witness whereof, the said parties to *their* presents have hereunto, interchangeably set their hands and seals the day and
299 year first above written.

[SEAL.] P. ANDERSON,
Executor and Trustee, etc.

[SEAL.] W. GOODMAN,
Executor and Trustee under the Will of H. Anderson, Deceased.

Sealed and delivered in the presence of
FINLEY I. WRIGHT.
S. H. FLEETWOOD.

STATE OF NEW YORK,
City and County of New York, ss:

On this ninth day of October, eighteen hundred and fifty-five, before me, a commissioner for said state, appointed by the governor of the state of Ohio, to take acknowledgments of deeds to be recorded in said state of Ohio, personally came Peter Anderson, and Walter Goodman to me known to be the grantors described in and who executed the within deed and severally acknowledged the signing and sealing of said deed as their voluntary act.

In witness whereof, I have hereunto subscribed my name, and affixed my official seal.

[SEAL.] STANLEY H. FLEETWOOD,
Commissioner.

(Endorsed.) Peter Anderson & Walter Goodman, trustees and executors of Henry Anderson, deceased. Charles Butler. Dated 1st October, 1855. Deed lots in Toledo. Recorder's office Lucas county. Received for record May 2, 1860 and recorded May 2, 1860, in Volume 34 of deeds pages 110, 111 and 112. Johnathan Wynn, recorder.

STATE OF OHIO,
Lucas County, ss:

I, George E. Hamlin, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed and the endorsements thereon recorded in volume 34 of the record of deeds of said Lucas county, at pages 110, 111 and 112, which said record of deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof, I have unto set my hand and affixed my official seal at Toledo, in said county, this 28th day of May, 1907.

[SEAL.] GEORGE E. HAMLIN.

Thereupon the defendant, further to maintain the issues upon his part, offered and read, and the court received in evidence duly certified copy of deed from P. W. Lucas, executor, to Charles Butler, dated April 16, 1860, together with certificate of ac-
300 knowledgment attached thereto, the endorsements thereon and certificate of the county recorder, Ohio, and said deed, certificates and endorsements were received in evidence, being in words and figurs as follows:

This indenture, made the sixteenth day of April, in the year of our Lord, one thousand eight hundred and sixty between Peter W. Lucas of Holly Springs, in the state of Mississippi, one of the trustees and executors under the last will and testament of Henry Anderson late of Holly Springs, deceased, of the first part, and Charles Butler of the city of New York, of the second part, witnesseth, that the said party of the first part, by virtue of the power

and authority to him given in and by the said last will and testament, and for and in consideration of the sum of one dollar (and other considerations), lawful money of the United States of America, to him in hand paid, at or before the ensealing and delivery of these presents, by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs and assigns forever released and discharged from the same by these presents, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, his heirs and assigns, forever, all those certain lots or parcels of land situate, lying and being in the Vistula division of the city of Toledo, county of Lucas, state of Ohio, known and designated as lots numbers eighteen (18), nineteen (19), twenty (20), twenty-one (21), one thousand and eight (1,008), one thousand and nine (1,009), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), one thousand 1,00-), one thousand and one (1,001), said lots being in one block, bounded northerly by Summit street, southerly by Water street easterly by Cherry street and westerly by Lynn street, also Water lot number nine hundred and nine-two (992), extending from Water street to the line of wharfing and fronting on the Miami river one hundred and seventy-six feet and sixty-five hundredths of a foot. Also town lots in the Port Lawrence division of the said city of Toledo, numbered one hundred and eighty-five (185), one hundred and seventy-six (176), one hundred and eighty-eight (188), two hundred and ninety-eight (298), one hundred and fifty-seven (157), forty-eight (48), two hundred and forty-six (246), two hundred and sixty-two (262), two hundred and eighty-six (286), three hundred and four (304), three hundred and thirty-two (332), three hundred and thirty-three
301 (333), three hundred and thirty-six (336), three hundred and thirty-seven (337), three hundred and thirty-eight (338), as the same were laid out and numbered on the recorded map of said city, being the same premises conveyed by Edson Allen, master commissioner in chancery, to Henry Anderson, by deed dated the eighteenth of November, one thousand eight hundred and forty-four.

Together with all and singular the edifices, buildings, rights, members, privileges, advantages, hereditaments and appurtenances to the same belonging, or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues, and profits, thereof. And also, all the estate, right, title, interest, claim and demand whatsoever, both in law and equity, which the said testator had in his lifetime, and at the time of his decease, and which the said party of the first part, has or hath, by virtue of the said last will and testament, or otherwise, of, in, and to the same, and every part and parcel thereof, with the appurtenances: To have and to hold the said premises above mentioned and described, and hereby granted and conveyed, or intended so to be, with the appurtenances, unto the said party of the second part, his heirs and assigns,

to his and their only proper use, benefit and behoof forever. It being understood that the above described premises were conveyed to Henry Anderson in fee but held by him in his lifetime as a mortgage to secure the payment of a certain sum of money due from Charles Butler to Henry Anderson, which fact, after his death was duly acknowledged under seal by William Anderson and James H. Anderson, his only heirs at law; said party of the first part covenants, grants, promises, and agrees to and with the said party of the second part and his heirs and assigns, that the said party of the second part, his heirs and assigns, shall and lawfully may from time to time, and at all times forever hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy all and singular the said hereditaments and premises hereby granted and conveyed, or intended so to be, with their and every of their appurtenances, and receive and take the rents, issues and profits thereof, to and for his and their own use, and benefit, without any lawful let, suit, hindrance, molestation, interruption or denial whatsoever, of, from or by him, the said party of the first part, or his assigns, or, of, from or by any other person or persons, whomsoever lawfully claiming or who shall or may lawfully claim hereafter by, from or under him, or by, from or under right, title, interest or estate; and that free and clear and freely and clearly discharged, acquitted and exonerated,
302 or otherwise well and sufficiently saved, defended, kept harmless and indemnified by him, the said party of the first part, his heirs and assigns, of, from and against all and all manner of former, and other gifts, grants, bargains, sales, mortgages, judgments, and all other charges and incumbrances whatsoever, had, made, committed, executed or done by him, the said party of the first part, or by, through, or with his acts, deeds, means, consent, procurement or privity. The premises herein conveyed being the same also described and conveyed in a deed, executed by Walter Goodman and Peter Anderson, two of the executors and trustees under the will of Henry Anderson, deceased, dated first of October, 1855, to Charles Butler, party of the second part and this deed being executed by said Lucas to remove doubts in respect to the title to the premises described and conveyed as aforesaid.

In witness whereof, the said party to these presents has hereunto interchangeably set his hand and seal the day and year first above written.

[SEAL.] P. W. LUCAS.
Executor of H. Anderson, Deceased.

Sealed and delivered in the presence of:

WM. M. SINCKLAND.
J. D. M. LITCHFIELD.

THE STATE OF MISSISSIPPI.
Marshall County:

Personally appeared before me, A. W. Goodrich, an acting justice of the peace, in and for said county, the within named P. W. Lucas,

who acknowledged that he signed, sealed and delivered the within deed on the day and year therein mentioned as his act and deed. In testimony whereof, I have hereunto set my hand and affixed the notarial seal of said county, this 17th day of April, 1860.

[SEAL.] A. W. GOODRICH,
Justice of the Peace and ex-Officio Notary Public.

(Endorsed:) Peter W. Lucas, trustee, etc., to Charles Butler. Dated 185–. Deed. Recorder's office, Lucas county, Ohio, received for record, May 2, 1860, and recorded May 3, 1860, in volume 34 of deeds, pages 112, 113 and 114. Johnathan Wynn, recorder.

Thereupon the defendant, further to maintain the issues upon his part, offered in evidence duly certified copy of deed from the city clerk of Toledo to Charles Butler, dated March 26, 1860, together with the certificate of acknowledgment attached thereto, the endorsements thereon and certificate of the county recorder of Lucas county, Ohio, attached thereto, said deed, certificates and endorsements being in words and figures as follows:

City Clerk of Toledo
to
Charles Butler.

Deed.

303 This indenture made the twenty-sixth day of March in the year one thousand eight hundred and sixty by and between Patrick J. Monahan as clerk of the city of Toledo, county of Lucas, in the state of Ohio, of the one part and Charles Butler of the city of New York of the other part, witnesseth. That whereas the treasurer of said city on the twenty-seventh of December in the year one thousand eight hundred and forty-nine, did sell according to the provisions of the charter and ordinances of said city in such case made and provided to Charles M. Dorr the following described lot situate in the city of Toledo for the Vistula Grade Tax charged thereon for the year, A. D., 1849, to-wit: Town lot number twenty (20) in the Vistula division of the city of Toledo, which said tax amounted to the sum of sixty-six 54-100 dollars and *ccts.* forthwith paid by the purchaser to the city treasurer, and more than two years having elapsed from the time of said sale and the said premises so sold not having been redeemed and the certificate of sale to said Charles M. Dorr, having been assigned and transferred to said Charles Butler and having been produced to me with the endorsement of the city treasurer thereon that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I the said Patrick J. Monahan, as clerk of the said city of Toledo, do hereby grant and convey to the said Charles Butler, his heirs and assigns forever the premises so sold as aforesaid, to have and to

hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof, the said Patrick J. Monahan, clerk of said city, has hereunto set his hand officially and the corporate seal of said city of the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of:

J. M. GLOYD.
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me the subscriber, a notary public, in and for said county, personally appeared Patrick J. Monahan, clerk of said city of Toledo, and as such, acknowledged the within instrument to be his official and voluntary act and deed for the purposes therein expressed. Given under my hand and official seal, this 27th day of March, A. D. 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas County, Ohio.

304 Received for record April 2, 1860, and recorded same day.
JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed, recorded in volume 34, of the record of deeds of said Lucas county, at page 6, which said record of deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof, I have — unto set my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D. 1905.

[SEAL.] (Signed) THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

To which the plaintiff objected upon the ground of incompetency, irrelevancy and immateriality, and upon the further ground that this court is precluded from a consideration of said deed by the opinion of the Circuit Court of Appeals upon the hearing of the second writ of error in this case.

Thereupon the defendant, by his counsel, stated to the court that he expected, intended and offered, and, if permitted, would by said deed prove the facts therein recited: that by said deed a good and

full title to the premises therein described vested in Charles Butler, the grantee therein, his heirs and assigns; and by said deed would prove the legality of all proceedings antecedent to the execution and delivery of said deed until impeached by some person or persons having an interest in setting aside the same, which offer the court rejected, to which ruling the defendant, by his counsel, then and there duly excepted. And thereupon the court sustained plaintiff's objection to said deed, to which ruling of the court, the defendant, by his counsel, then and there duly excepted.

Thereupon the defendant, further to maintain the issues upon his part, offered in evidence, duly certified copy of deed from the city clerk of Toledo, to Charles Butler, dated March 26, 1860, together with the certificate of acknowledgment attached thereto the endorsements thereon, and certificate of the county recorder of Lucas county, Ohio, attached thereto, said deed, certificates and endorsements being in words and figures as follows:

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March in the year one thousand eight hundred and sixty by and between Patrick J. Monahan as clerk of the city of Toledo, county of Lucas, in
305 the state of Ohio of the one part and Charles Butler of the city of New York of the city, county, and state aforesaid of the other part, witnesseth: That whereas the treasurer of said city on the 27th day of December in the year one thousand eight hundred and forty-seven, did sell according to the provisions of the charter and ordinances of said city in such case made and provided to Charles W. Hill, the following described lot situate in the city of Toledo for the Vistula Grade Tax, charged thereon for the year 1847, to-wit: Town lot number thirty in the Vistula division of the city of Toledo, which said tax, amounted to the sum of ninety-nine 86-100 dollars and were forthwith paid by the purchaser to the city treasurer, and more than two years having elapsed from the time of said sale and the said premises so sold not having been redeemed and the certificate of sale to said Charles W. Hill, having been by him assigned and transferred to the said Charles Butler and having been produced to me with the endorsement of the city treasurer thereon that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick Monahan, as clerk of the said city of Toledo, doth hereby grant and convey to the said Charles Butler, his heirs and assigns forever the premises so sold as aforesaid, to have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof, the said Patrick J. Monahan, clerk of said city has hereunto set his hand officially and the corporate seal of said city on the day and year first above written.

PATRICK J. MONAHAN.
[SEAL.] *City Clerk.*

Signed, sealed and delivered in presence of:
J. M. GLOYD.
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me the subscriber, a notary public, in and for said county, personally appeared Patrick J. Monahan, clerk of said city of Toledo, and as such, acknowledged the within instrument to be his voluntary, and official act and deed for the purposes therein expressed. Given under my hand and official seal, this 27th day of March, A. D., 1860.

J. M. GLOYD,
[SEAL.] *Notary Public, Lucas County, Ohio.*

Received for record April 2, 1860, and recorded April 3, 1860.
JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, county recorder of Lucas county,
306 in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed, recorded in volume 34, of the record of deeds of said Lucas county, at page 8, which said record of deeds is in the office of county recorder of said Lucas count-, and is in my custody and control as such county recorder.

In testimony whereof, I have unto set *set* my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D., 1905.

(Signed) THOS. H. BARKDULL,
[SEAL.] *County Recorder of Lucas County, Ohio.*

To which the plaintiff objected upon the ground of incompetency, irrelevancy and immateriality, and upon the further ground that this court is precluded from a consideration of said deed by the opinion of the Circuit Court of Appeals upon the hearing of the second writ of error in this case.

Thereupon the defendant, by his counsel, stated to the court that he expected, intended and offered, and, if permitted, would by said deed prove the facts therein recited; that by said deed a good and full title to the premises therein described vested in Charles Butler, the grantee herein, his heirs and assigns; and by said deed would prove the legality of all proceedings antecedent to the execution and delivery of said deed

until impeached by some person or persons having an interest in setting aside the same, which offer the court rejected, to which ruling the defendant, by his counsel, then and there duly excepted. And thereupon the court sustained plaintiff's objection to said deed, to which ruling of the court, the defendant, by his counsel, then and there duly excepted.

Thereupon the defendant, further to maintain the issues upon his part, offered in evidence, duly certified copy of deed from the city clerk of Toledo, to Charles Butler, dated March 26, 1860, together with the certificate of acknowledgment attached thereto, the endorsements thereon, and certificate of the county recorder of Lucas county, Ohio, attached thereto, said deed, certificates and endorsements being in words and figures as follows:

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March in the year one thousand eight hundred and sixty by and between Patrick J. Monahan as clerk of the city of Toledo, county of Lucas, in the state of Ohio of the one part and Charles Butler of the city of New York of the other part, witnesseth: That whereas the treasurer of said city on the twenty-seventh of December in the year one
307 thousand eight hundred and forty-nine, did sell according to the provisions of the charter and ordinances of said city in such case made and provided to Charles M. Dorr the following described lot situate in the city of Toledo for the Vistula Grade Tax charged thereon for the year, A. D., 1849, to-wit: Town lot number thirty-one in the Vistula division of the city of Toledo, which said tax amounted to the sum of seventy-six 56/100 dollars and were forthwith paid by the purchaser to the city treasurer, and more than two years having elapsed from the time of said sale and the said premises so sold not having been redeemed and the certificate of sale to said Charles M. Dorr, having been assigned and transferred to said Charles Butler and having been produced to me with the endorsement of the city treasurer thereon that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as clerk of the said city of Toledo, doth hereby grant and convey to the said Charles Butler, his heirs and assigns forever the premises so sold as aforesaid, to have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof, the said Patrick J. Monahan, clerk of said city, has hereunto set his hand officially and the corporate seal of said city of the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of:
J. M. GLOYD,
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me the subscriber, a notary public in and for said county, personally appeared Patrick J. Monahan, clerk of said city of Toledo, and as such, acknowledged the within instrument to be his voluntary and official act and deed for the purposes therein expressed. Given under my hand and official seal, this 27th day of March, A. D. 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas County, Ohio.

Received for record April 2, 1860, and recorded April 3, 1860.
JONATHAN WYNN,
Recorder.

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed, recorded in volume 34, of the record of deeds of said Lucas
308 county, at page 11, which said record of deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof, I have unto set my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D. 1905.

[SEAL.] (Signed) THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

To which the plaintiff objected upon the ground of incompetency, irrelevancy and immateriality, and upon the further ground that this court is precluded from a consideration of said deed by the opinion of the Circuit Court of Appeals upon the hearing of the second writ of error in this case.

Thereupon the defendant, by his counsel, stated to the court that he expected, intended and offered, and, if permitted, would by said deed prove the facts therein recited; that by said deed a good and full title to the premises therein described vested in Charles Butler, the grantee therein, his heirs and assigns; and by said deed would prove the legality of all proceedings antecedent to the execution and delivery of said deed until impeached by some person or persons having an interest in setting aside the same, which offer the court rejected, to which ruling the defendant, by his counsel, then and there duly excepted. And thereupon the court sustained plaintiff's objection to said deed, to which ruling of the court, the defendant, by his counsel, then and there duly excepted.

Thereupon the defendant, further to maintain the issues upon his part, offered in evidence, duly certified copy of deed from the city clerk of Toledo, to Charles Butler, dated March 26, 1860, together with the certificate of acknowledgment attached thereto, the endorse-

ments thereon, and certificate of the county recorder of Lucas county, Ohio, attached thereto, said deed, certificates and endorsements being in words and figures as follows:

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March in the year one thousand eight hundred and sixty by and between Patrick J. Monahan as clerk of the city of Toledo, county of Lucas, in the state of Ohio of the one part and Charles Butler of the city of New York of the other part, witnesseth: That whereas the treasurer of said city on the twenty-seventh of December in the year one thousand eight hundred and forty-seven, did sell according to the provisions of the charter and ordinances of said city in such case made and provided to Charles M. Dorr the following described lot situate in the
309 city of Toledo for the Vistula Grade Tax charged thereon for the year, A. D. 1847, to-wit: Town lot number thirty-two (32) in the Vistula Division of the city of Toledo, which said tax amounted to the sum of seventy-six 56-100 dollars and were forthwith paid by the purchaser to the city treasurer, and more than two years having elapsed from the time of said sale and the said premises so sold not having been redeemed and the certificate of sale to said Charles M. Dorr, having been by him assigned and transferred to said Charles Butler and having been produced to me with the endorsement of the city treasurer thereon that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as clerk of the said city of Toledo, do hereby grant and convey to the said Charles Butler, his heirs and assigns forever the premises so sold as aforesaid, to have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof, the said Patrick J. Monahan, clerk of said city, has hereunto set his hand officially and the corporate seal of said city on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of:

J. M. GLOYD.
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me the subscriber, a notary public, in and for said county, personally appeared Patrick J. Monahan, clerk of said city of Toledo, and as such, acknowledged the within instrument to be his volun-

tary and official act and deed for the purposes therein expressed. Given under my hand and official seal, this 27th day of March, A. D., 1860.

[SEAL.]

J. M. GLOYD,
Notary Public, Lucas county, Ohio.

Received for record April 2, 1860, and recorded April 3, 1860.

JONATHAN WYNN,
Recorder.

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Geo. E. Hamlin, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed, recorded in volume 34, of the record of deeds of said Lucas county, at page 13, which said record of deeds is in the office of county recorder of said Lucas county, and is in my custody and control as such
310 county recorder.

In testimony whereof, I have unto set my hand and affixed my official seal at Toledo, in said county, this 7th day of December, A. D., 1906.

[SEAL.] (Signed) GEO. E. HAMLIN,
County Recorder of Lucas County, Ohio.

To which the plaintiff objected upon the ground of incompetency, irrelevancy and immateriality, and upon the further ground that this court is precluded from a consideration of said deed by the opinion of the Circuit Court of Appeals upon the hearing of the second writ of error — this case.

Thereupon the defendant, by his counsel, stated to the court that he expected, intended and offered, and, if permitted, would by said deed prove the facts therein recited; that by said deed a good and full title to the premises therein described vested in Charles Butler, the grantee therein, his heirs and assigns; and by said deed would prove the legality of all proceedings antecedent to the execution and delivery of said deed until impeached by some person or persons having an interest in setting aside the same, which offer the court rejected, to which ruling the defendant, by his counsel, then and there duly excepted. And thereupon the court sustained plaintiff's objection to said deed, to which ruling of the court, the defendant, by his counsel, then and there duly excepted.

Thereupon the defendant, further to maintain the issues upon his part, offered in evidence, duly certified copy of deed from the city clerk of Toledo, to Charles Butler, dated March 26, 1860, together with the certificate of acknowledgment attached thereto, the endorsements thereon, and certificate of the county recorder of Lucas county, Ohio, attached thereto, said deed, certificates and endorsements being in words and figures as follows:

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March in the year one thousand eight hundred and sixty by and between Patrick J. Monahan as clerk of the city of Toledo, county of Lucas, in the state of Ohio of the one part and Charles Butler of the city of New York of the other part, witnesseth: That whereas the treasurer of said city on the twenty-seventh of December in the year one thousand eight hundred and forty-seven, did sell according to the provisions of the charter and ordinances of said city — such case made and provided to Charles M. Dorr the following described lot situate in the city of Toledo for the Vistula grade tax- charged thereon for the year A. D., 1847 to-wit: Town lot number thirty-three (33),
311 in the Vistula division of the city of Toledo, which said tax- amounted to the sum of seventy-six 56-100 dollars and were forthwith paid by the purchaser to the city treasurer, and more than two years having elapsed from the time of said sale and the said premises so sold not having been redeemed and the certificate of sale to said Charles M. Dorr, having been by him assigned and transferred to said Chas. Butler and having been produced by me with the endorsement of the city treasurer thereon that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as clerk of the said city of Toledo do*th* hereby grant and convey to the said Charles Butler, his heirs and assigns forever the premises so sold as aforesaid, to have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns forever.

In witness whereof, the said Patrick J. Monahan, clerk of said city, has hereunto set his hand officially and the corporate seal of said city on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of:

J. M. GLOYD.
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me the subscriber, a notary public, in and for said county, personally appeared Patrick J. Monahan, clerk of said city of Toledo, and as such, acknowledged the within instrument to be his voluntary and official act and deed for the purposes therein ex-

pressed. Given under my hand and official seal, this 27th day of March, A. D., 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas County, Ohio.

Received for record April 2, 1860, and recorded April 3, 1860.
JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Geo. E. Hamlin, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed, recorded in volume 34, of the record of deeds of said Lucas county, at page 15, which said record of deeds is in the office of county recorder of said Lucas count-, and is in my custody and control as such county recorder.

312 In testimony whereof, I have -unto set my hand and affixed my official seal at Toledo, in said county, this 27th day of December, A. D., 1906.

[SEAL.] (Signed) GEO. E. HAMLIN.
County Recorder of Lucas County, Ohio.

To which the plaintiff objected upon the ground of incompetency, irrelevancy and immateriality, and upon the further ground that this court is precluded from a consideration of said deed by the opinion of the Circuit Court of Appeals upon the hearing of the second writ of error in this case.

Thereupon the defendant, by his counsel, stated to the court that he expected, intended and offered, and, if permitted, would by said deed prove the facts therein recited; that by said deed a good and full title to the premises therein described vested in Charles Butler, the grantee therein, his heirs and assigns; and by said deed would prove the legality of all proceedings antecedent to the execution and delivery of said deed until impeached by some person or persons having an interest in setting aside the same, which offer the court rejected, to which ruling the defendant, by his counsel, then and there duly excepted. And thereupon the court sustained plaintiff's objection to said deed, to which ruling of the court, the defendant, by his counsel, then and there duly excepted.

Thereupon the defendant, further to maintain the issues upon his part, offered in evidence, duly certified copy of deed from the city clerk of Toledo, to Charles Butler, dated March 26, 1860, together with the certificate of acknowledgment attached thereto, the endorsements thereon, and certificate of the county recorder of Lucas county, Ohio, attached thereto, said deed, certificates and endorsements being in words and figures as follows:

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March in the year one thousand eight hundred and sixty by and between Patrick J. Monahan as clerk of the city of Toledo, county of Lucas, in the state of Ohio of the one part and Charles Butler of the city of New York of the other part, witnesseth: That whereas the treasurer of said city on the twenty-seventh of December in the year one thousand eight hundred and forty-seven, did sell according to the provisions of the charter and ordinances of said city in such case made and provided to Charles M. Dorr the following described lot situate in the city of Toledo for the Vistula grade tax- charged thereon for the year 1847, to wit: Town lot number one thousand and eight (1,008), in the Vistula division of the city of Toledo which said tax-
313 amounted to the sum of one hundred and sixty-six 42-100 dollars and were forthwith paid by the purchaser to the city treasurer and more than two years having elapsed from the time of said sale and the said premises so sold not having been redeemed and the certificate of sale to the said Charles M. Door, having been assigned and transferred to the said Charles Butler and having been produced to me with the endorsement of the city treasurer thereon that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as clerk of the said city of Toledo, do*th* hereby grant and convey to the said Charles Butler his heirs and assigns forever the premises so sold as aforesaid. To have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler his heirs and assigns forever.

In witness whereof the said Patrick J. Monahan, clerk of said city has hereunto set his hand officially and the corporate seal of said city on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN, *City Clerk.*

Signed, sealed and delivered in presence of—

J. M. GLOYD,
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me the subscriber, a notary public, in and for said county, personally appeared Patrick J. Monahan, clerk of said city of Toledo, and as such, acknowledged the within instrument to be his voluntary and official act and deed for the purposes therein expressed.

Given under my hand and official seal, 27th day of March, A. D. 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas County, Ohio.

Received for record April 2, 1860, and recorded April 3, 1860.
JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Thos. H. Barkdull, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed, recorded in volume 34, of the records of deeds of said Lucas county, at page 20, which said record of deeds is in the office of county recorder in said Lucas county, and is in my custody and control as such county recorder.

314 In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D., 1905.

[SEAL.] (Signed) THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

To which the plaintiff objected upon the ground of incompetency, irrelevancy and immateriality, and upon the further ground that this court is precluded from a consideration of said deed by the opinion of the Circuit Court of Appeals upon the hearing of the second writ of error in this case.

Thereupon the defendant, by his counsel, stated to the court that he expected, intended and offered, and, if permitted, would by said deed prove the facts therein recited; that by said deed a good and full title to the premises therein described vested in Charles Butler, the grantee therein, his heirs and assigns; and by said deed would prove the legality of all proceedings antecedent to the execution and delivery of said deed until impeached by some person or persons having an interest in setting aside the same, which offer the court rejected, to which ruling the defendant, by his counsel, then and there duly excepted. And thereupon the court sustained plaintiff's objection to said deed, to which ruling of the court, the defendant, by his counsel, then and there duly excepted.

Thereupon the defendant, further to maintain the issues upon his part, offered in evidence, duly certified copy of deed from the city clerk of Toledo, to Charles Butler, dated March 26, 1860, together with the certificate of acknowledgment attached thereto, the endorsements thereon, and certificate of the county recorder of Lucas county, Ohio, attached thereto, said deed, certificates and endorsements being in words and figures as follows:

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March in the year one thousand eight hundred and sixty by and between Patrick J. Monahan, as clerk of the city of Toledo, county of Lucas, in the state of Ohio, of one part and Charles Butler, — city of New York, of the other part, witnesseth: That whereas the treasurer of said city on the twenty-seventh day of December in the year one thousand eight hundred and forty-seven, did sell according to the provisions of the charter and ordinances of said city in such case made and provided, to Charles M. Dorr the following described lot situate in the city of Toledo for the Vistula grade tax- charged thereon for the year 1847, to-wit: Town lot number one thousand and nine (1,009), in the Vistula division of the city of Toledo which said tax-
315 amounted to the sum of one hundred and ninety-nine 70/100 dollars and were forthwith paid by the purchaser to the city treasurer and more than two years having elapsed from the time of said sale and the lots so sold not having been redeemed and the certificate of sale to the said Charles M. Dorr, having been assigned and transferred to the said Charles Butler and having been produced to me with the endorsement of the city treasurer thereon that no money had been deposited with him for the redemption thereof. Now in consideration of the premises and on the request of the said Charles Butler, I, the said Patrick J. Monahan, as clerk of the said city of Toledo, do*th* hereby grant and convey to the said Charles Butler his heirs and assigns forever the premises so sold as aforesaid. To have and to hold the said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler his heirs and assigns forever.

In witness whereof the said Patrick J. Monahan, clerk of said city has hereunto set his hand officially and the corporate seal of said city on the day and year first above written.

[SEAL.] PATRICK J. MONAHAN, *City Clerk.*

Signed, sealed and delivered in presence of—
J. M. GLOYD,
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me the subscriber, a notary public, in and for said county, personally appeared Patrick J. Monahan, clerk of said city of Toledo, and as such, acknowledged the within instrument to be his voluntary and official act and deed for the purposes therein expressed.

Given under my hand and official seal, this 27th day of March, A. D. 1860.

[SEAL.] J. M. GLOYD.
Notary Public, Lucas County, Ohio.

Received for record April 2, 1860, and recorded April 3, 1860.
JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas county, ss:

I, Thos. H. Barkdull, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the records of a certain deed, recorded in volume 34, of the record of deeds of said Lucas county, at page 22, which said record of deeds is in the office of county recorder in said Lucas county, and is in my custody and control as such county recorder.

316 In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 29th day of April, A. D., 1905.

[SEAL.] (Signed). THOS. H. BARKDULL,
County Recorder of Lucas County, Ohio.

To which the plaintiff objected upon the ground of incompetency, irrelevancy and immateriality, and upon the further ground that this court is precluded from a consideration of said deed by the opinion of the Circuit Court of Appeals upon the hearing of the second writ of error in this case.

Thereupon the defendant, by his counsel, stated to the court that he expected, intended and offered, and, if permitted, would by said deed prove the facts there recited, that by said deed a good and full title to the premises therein described vested in Charles Butler, the grantee therein, his heirs and assigns; and by said deed would prove the legality of all proceedings antecedent to the execution and delivery of said deed until impeached by some person or persons having an interest in setting aside the same, which offer the court rejected, to which ruling the defendant, by his counsel, then and there duly excepted. And thereupon the court sustained plaintiff's objection to said deed, to which ruling of the court, the defendant, by his counsel, then and there duly excepted.

Thereupon the defendant, further to maintain the issues upon his part, offered in evidence, duly certified copy of deed from the city clerk of Toledo, to Charles Butler, dated March 26, 1860, together with the certificate of acknowledgdment attached thereto, the endorsements thereon, and certificate of the county recorder of Lucas county, Ohio, attached thereto, said deed, certificates and endorsements being in words and figures as follows:

City Clerk of Toledo
to
Charles Butler.

Deed.

This indenture made the twenty-sixth day of March in the year one thousand eight hundred and sixty by and between Patrick J. Monahan, as clerk of the city of Toledo, county of Lucas, in the state of Ohio, of one part and Charles Butler, city of New York, of the other part, witnesseth: That whereas the treasurer of said city on the twenty-seventh of December in the year one thousand eight hundred and forty-seven, did sell according to the provisions of the charter and ordinances of said city in such case made and provided, to T. H. Hough, the following described, town lot situate in the city of Toledo for the special tax assessed for grading certain street as provided for by ordinance passed June 26, 1843, known as the Vistula special grade tax charged thereon for the year
317 1847 to-wit: Town lot number (1,008½) Vistula division of Toledo, being all that piece of land or lot lying between lot 20 Vistula division and lot 1,008 addition to Vistula being 21 feet front on Lynn street, running easterly 82½ feet from Lynn street, which said taxes amounted to the sum of forty-six 60-100 dollars, and were forthwith paid by the purchaser to the city treasurer. And more than two years having elapsed from the time of said sale, and the said sale and the said premises so sold not having been redeemed, and the certificate of sale to the said T. H. Hough, having been assigned and transferred by him to the said Charles Butler, and having been produced to me, with the endorsement of the city treasurer thereon, that no money had been deposited with him for the redemption thereof. Now, in consideration of the premises, and on the request of the said Charles Butler, I, the said Patrick J. Monahan as clerk of the said city of Toledo, doth hereby grant and convey to the said Charles Butler, his heirs and assigns forever, the premises so sold as aforesaid.

To have and to hold said premises hereby conveyed to the only and proper use and benefit of the said Charles Butler, his heirs and assigns, forever. In witness whereof, the said Patrick J. Monahan, clerk of said city has hereunto set his hand official and the corporate seal of said city of the day and year first above written.

[SEAL.] PATRICK J. MONAHAN,
City Clerk.

Signed, sealed and delivered in presence of:
J. M. GLOYD.
GEO. P. ESTE.

THE STATE OF OHIO,
Lucas County, ss:

Before me the subscriber, a notary public, in and for said county, personally appeared Patrick J. Monahan, clerk of said city of Toledo,

and as such, acknowledged the within instrument to be his official and voluntary act and deed for the purposes therein expressed. Given under my hand and official seal, this 27th day of March, A. D., 1860.

[SEAL.] J. M. GLOYD,
Notary Public, Lucas County, Ohio.

Received for record April 2, 1860 and recorded April 3, 1860.
JONATHAN WYNN, *Recorder.*

UNITED STATES OF AMERICA,
State of Ohio, Lucas County, ss:

I, Geo. E. Hamlin, county recorder of Lucas county, in the state aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the record of a certain deed, recorded in volume 34, of the records of deeds of said Lucas county, at page 21, which said record of deeds is in the office of county re-
318 corder of said Lucas county, and is in my custody and control as such county recorder.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Toledo, in said county, this 7th day of December, A. D., 1906.

[SEAL.] (Signed) GEO. E. HAMLIN,
County Recorder of Lucas County, Ohio.

To which the plaintiff objected upon the ground of incompetency, irrelevancy and immateriality, and upon the further ground that this court is precluded from a consideration of said deed by the opinion of Circuit Court of Appeals upon the hearing of the second writ of error in this case.

Thereupon the defendant, by his counsel, stated to the court that he expected, intended and offered, and, if permitted, would by said deed prove the facts therein recited; that by said deed a good and full title to the premises therein described vested in Charles Butler, the grantee therein, his heirs and assigns; and by said deed would prove the legality of all proceedings antecedent to the execution and delivery of said deed until impeached by some person or persons having an interest in setting aside the same, which offer the court rejected, to which ruling the defendant, by his counsel, then and there duly excepted. And thereupon the court sustained plaintiff's objection to said deed, to which ruling of the court, the defendant, by his counsel, then and there duly excepted.

Thereupon it was stipulated in open court by and between counsel for plaintiff and defendant, respectively, that without waiving any objection thereto by reason of competency, relevancy or materiality, each and all of the instruments, documents, records and writings appearing at length in or attached to and made part of this bill of exceptions are in fact true and correct copies of the originals of such instruments, documents, records and writings, and that such copies shall be given and shall have the same force and effect as though the originals thereof had been produced, identified and used upon the trial of said action and attached hereto, instead of said copies;

no objection being made for want of certification or more complete certification of any of such copies.

Thereupon the defendant rested.

Thereupon the plaintiff, further to maintain the issues upon his part, offered in evidence in rebuttal a letter from Charles Butler to Walter Goodman, same being as follows:

"No. 12 Wall Street,
"New York, *2nd March*, 1860.

W. Goodman.

319 My Dear Sir: I have just received your letter of the 22nd February, after I had written to you on the 9th Mr. Bronson, the party who was negotiating with me for the Toledo property, came to New York and wanted to negotiate for the entire block instead of a part of it, as had been talked of; after three days constant at it we concluded a bargain, the details of which I have communicated to you, for the whole block at $17,500, but he became uneasy about the situation of the title and would not agree to pay any money till I was prepared to give him a good deed with certificate of title. I enclose a copy of the clause in the agreement between us that you may understand perfectly the great importance to me of having the deed now lying in the Manhattan Bank, in escrow, delivered to me that I may take a proper deed of warranty to Mr. Bronson as early as practicable that he may have no possible excuse for backing out, which would now be serious to us all.

I also hand you copy of the account as finally settled on 1 October, 1854, by you and Mr. Anderson, and which we had before us on 1 October, 1855; you and Mr. Anderson being then here and at which date you executed the deed and lodged it in escrow with W. C. Halstead, of Manhattan Bank, to be delivered to me on the order of either of you.

Since then the only payment made was of $4,000 to Peter Anderson on 1 January, 1857, of which you have also a statement, as you recollect. I hold his draft paid by me for it. By the terms of the agreement with James, made in 1852 after he became of age, as you recollect, I was to pay 6 per cent interest. In the fall of 1855, when we had the final adjustment here I agreed to pay 7 per cent after that date and I have so computed the amount, making $9,183.88, on 1 January last. This, of course, is simple interest and is in accordance with our understanding.

If you will give me an order on Mr. Halstead for the deed I will lodge with him a stipulation to pay over the money to be received from Mr. Bronson, on the first day of May (the $2,000 and interest on it from 26 Dec. last) and also to place with him the bond and mortgage or notes and mortgage which I am to take from Mr. Bronson for $15,000 duly assigned by me to James H. Anderson, as collateral security for the payment of the balance due from me. I want to place the papers at the earliest day practicable in the hands of the lawyer, M. R. Waite, esquire, of Toledo, whose certificate of title I am bound to furnish to Mr. Bronson. Of course there is no transfer of title till the whole thing is consummated.

320 Please give your attention to this to aid me in perfecting this sale, which I have labored to accomplish to effect the payments to Mr. Anderson.

I will write you on other matters in another letter.

In haste, truly yours,

CHARLES BUTLER."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgment, and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because incompetent evidence to attack or destroy defendant's record title.

3. Because said evidence, and each and every part thereof, is incompetent, irrelevant and immaterial.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said letter hereinbefore set forth was received and read in evidence.

Thereupon the plaintiff, further to maintain the issues upon his part, offered in evidence in rebuttal a letter from Charles Butler to Walter Goodman, same being as follows:

"No. 12 Wall Street,
"New York, 25 *Feb'y*, 1860.

My Dear Sir: Enclosed I hand you copy of letter to James H. Anderson, relative to the sale of my Toledo property, which I have accomplished after a great deal and very protracted negotiations, dating back to last spring, and to a most excellent, prompt and responsible purchaser. He is one of the largest tobacco manufacturers in the West, and his capital is embarked in that. He intends to proceed immediately on obtaining his title to improving the property and to erect extensive buildings. He holds my contract to make a good title on or before the 1st May on which he pays $2,000 and interest to that date on it. Another payment will be made on 20th July of $465, and on the 20th January following, $2,465.

"I am to take his bond and mortgage for the balance of $15,500 on the first of May, which bond and mortgage I will assign and
321 deposit with Mr. C. O. Halstead in Manhattan Bank. The deed to me you will recollect is in Mr. Halstead's hands in escrow, deposited by you some years ago, and this I shall have to have delivered to me to enable me to make my warrantee deed to Mr. Bronson; and now, my dear sir, you will see at once the im-

portance of this matter to me and of your co-operation to enable me to close with Mr. Bronson, and the sooner the better.

"He will pay the money as soon as he can get the title on receiving 15 days notice. I should despair of finding another purchaser at so good a price in ten years again, if this should fail me. The amount of principal and interest due from me is a little over $9,000 on the first of January instant. The amount of this sale is $17,500, the cash payment to be immediately paid James, and the bond and mortgage assigned. I should add that the water lot is not included in my sale. That is in dispute in respect to title and quantity, and having no improvement on it is of very little value, and could not be sold for anything, nor could I make title to it.

"I hope to see you here in March or April and beg that you will aid me in closing this sale. I want the deed as soon as I can get it, and this can only be delivered on your order. My stipulation is to have all the papers at Toledo on or before the first of May, and my plan would be to have them all here in the hands of my counsel, M. R. Waite, Esq., to be delivered and put on record simultaneously on payment of the $2,000, and the execution and delivery of the bond and mortgage by Mr. Bronson. Mr. Waite can also act for you and receive the money and take the bond and mortgage, if you desire, but I presume you would consider me your agent for that purpose.

"Please let me know at what time you expect to come on North, and what, if anything more, is required of me before you leave home.

In haste, dear sir, truly yours,

"CHARLES BUTLER."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against
322 the defendant.

2. Because incompetent evidence to attack or destroy defendant's record title.

3. Because said evidence, and each and every part thereof, is incompetent, irrelevant and immaterial.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said letter hereinbefore set forth was received and read in evidence.

Thereupon the plaintiff, further to maintain the issues upon his part, offered in evidence in rebuttal the following contract between Henry Anderson and Charles Butler, viz.:

"Whereas, Charles Butler of the city of New York, as collateral security for the payment of his note in favor of Henry Anderson of Holly Springs, in the state of Mississippi, for twenty thousand dollars, heretofore duly assigned to the said Henry Anderson, a certain bond executed by Edward Bissell of Toledo, in the county of Lucas and state of Ohio, bearing date the 19th day of May, 1838, and conditioned for the payment of twenty-one thousand five hundred dollars, in one year from the date thereof with interest, together with a certain mortgage collateral to said bond executed by the said Edward Bissell and Jane A. M., his wife, on certain lots of land lying in the Port Lawrence division of Toledo aforesaid, in said mortgage particularly specified, and whereas default having been made in the payment of the moneys intended to be secured by said bond and mortgage, such proceedings in relation thereto have been taken in the name and behalf of the said Henry Anderson, the assignee of said bonds and mortgage, that an order for the sale of the premises embraced in said mortgage has been duly made and confirmed; and whereas also a decree or judgment has been or may be obtained in favor of the said Henry Anderson against the said Edward Bissell personally, for the amount of such deficiency as may be due on said bond and mortgage after the sale of the mortgage premises.

"And whereas the said Charles Butler as a further collateral security for the payment of his said note, in favor of the said Henry Anderson, has heretofore duly assigned to the said Henry Anderson, five hundred and forty-six shares of the capital stock of the Erie and Kalamazoo Railroad Company, of the par value of fifty dollars per share.

"And whereas the said Henry Anderson at the instance and request of the said Charles Butler and in consideration of the covenant the said Charles Butler hereinafter contained is willing to
323 relinquish and surrender to the said Charles Butler, the collateral securities, so assigned as aforesaid, for the payment of said note of twenty thousand dollars, so far as the same may be done without prejudice or injury, to the order obtained for the sale of the said mortgaged premises, and the rights of the said Henry Anderson under the same, and without prejudice to the personal liability of the said Charles Butler, to the said Henry Anderson on the principal debt.

"Now, therefore these presents witness, that in consideration of the premises and for the purpose of giving effect to the same, the said Henry Anderson has on the day of the date hereof executed and delivered a power of attorney to the said Charles Butler, empowering and authorizing him fully and effectually, if he shall see fit to do so, to release and discharge the said Edward Bissell of and from all personal claim, demand or liability whatsoever for or on account of the said bond and mortgage but without prejudice to the proceedings, which have been or may be adopted, to offset the sale of said mortgaged premises and that the said Henry Anderson has also by instrument in writing released and transferred to the said Charles Butler the said five hundred and forty-six shares of Erie and Kalamazoo Railroad Company stock.

"And the said Charles Butler, in consideration of the surrender and relinquishment of the said securities hereby covenants and agrees to and with the said Henry Anderson, that the same shall not be held or construed in any way to affect or impair the liability of him the said Butler on the said note for twenty thousand dollars, and the said Charles Butler also covenants and agrees to and with said Henry Anderson that he, the said Butler, will well and faithfully apply and pay over to the said Henry Anderson, on account of the said note, all sums of money or other valuable consideration, which he, the said Butler may receive, or derive by reason of the surrender and relinquishment of the securities aforesaid, by him, the said Henry Anderson.

"In testimony whereof the said Henry Anderson and Charles Butler have hereunto respectively set their hands and seals, in duplicate this fourth day of October in the year one thousand eight hundred and forty-four.

(Signed)

[SEAL.] HENRY ANDERSON.
[SEAL.] CHARLES BUTLER.

In the presence of:
(Signed) S. H. FLEETWOOD."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on
324 the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because there is no evidence that at the time of the making of this contract, Charles Butler was in possession of the property, and without such proof said contract would be wholly incompetent evidence herein for any purpose.

3. Because there is no proof in the record whatever of knowledge or notice of said contract on the part of Calvin Bronson, or of any one claiming under him, including the defendant.

4. Because said contract, is incompetent evidence to attack or destroy the record title to the premises in controversy.

5. Also because incompetent, irrelevant and immaterial.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said contract hereinbefore set forth was received and read in evidence.

Thereupon the plaintiff, further to maintain the issues upon his part, offered in evidence in rebuttal sections 1, 2, and 6 of the

stipulation No. 2, and "Exhibit A," said sections and said exhibit, respectively, being in words and figures as follows:

"Sec. 1. It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys, that Charles Butler, under whom the defendant claims title to the real estate made the subject of this action, died at his then home in the city of New York, New York, on December 13, 1897; that the written instruments, books, documents, statements, letters, press copies of letters and statements, and all other instruments, described in Exhibit A hereto attached and hereby made a part hereof, were each and all at or shortly after the death of said Charles Butler, found amongst and with the family and other papers of said Charles Butler; that each and all of said instruments, were at all times after the death of said Charles Butler, until shortly after the commencement of this case in the possession and custody and
325 under the control of Miss Emily O. Butler, the only surviving child and sole heir at law of said Charles Butler, deceased; that shortly after the commencement of this case, said Miss Emily O. Butler, delivered each and all of said instruments to her cousin, Mr. Willard Parker Butler, at his law office, No. 59 Wall street, in the city of New York, N. Y., and that each and all of the instruments described in said Exhibit A are now produced by him; that each and all of said written instruments, books, documents, statements, letters and press copies of letters, and statements, and other instruments, described in said Exhibit A, were written prior to and more than thirty years before the commencement of this cause; that to avoid the taking of depositions herein and thus subserve the mutual convenience of both parties hereto and reduce the expenses of said parties, each and all of said instruments described in said Exhibit A, shall, upon the execution hereof, be delivered to Mr. Oliver B. Snider, attorney at law of Toledo, Ohio; who shall transmit same to Toledo, Ohio, same there to be kept in his custody and under his control until said instruments, or any of them, shall be desired by either of the parties hereto for use upon the trial of this case, when same shall be produced by him for such use, and any further or other proof whatsoever with respect to the genuineness and authenticity of any and all of said instruments described in said Exhibit A, shall be and hereby is dispensed with, and said instruments, or any of them, described in said Exhibit A may be offered in evidence at the trial of this cause by either of the said parties without formal notice to produce them, or any of them, any such notice being hereby waived, any such offer, however, or any of said instruments to be subject to objections for want of competency or relevancy for reasons other than the genuineness and authenticity of said instruments or of any of them, or the omission to give formal notice to produce same."

"Sec. 2. It is further hereby stipulated and agreed by and between said parties, by their respective attorneys, that until the trial of this cause only the attorneys of record therein shall be entitled to examine said instruments and until the final determination of this cause said instruments shall at all times remain in the possession and under the

custody and control of said Mr. Oliver B. Snider, or his legal representatives, when the same shall be returned to said Mr. Willard Parker Butler, and copies of said instruments received in evidence may be substituted for the originals for making up the record in this case."

"SEC. 6. It is further agreed that at the time the executors and trustees of the will of Henry Anderson, deceased, turned over
326 to James H. Anderson, in settlement of their trust, the property and effects coming to him under said will (which took place some time prior to May 1st, 1860), the note last herein referred to, had not been fully paid or extinguished, and that if any payments were thereafter made and intended as credits upon said note, the same were made to James H. Anderson. But either party shall be at liberty to offer proof concerning the precise date when the executors and trustees of Henry Anderson, deceased, were finally discharged, such proof to be subject to all legal objections."

"EXHIBIT A."

"Referred to and made a part of the foregoing stipulation.

"*List of Written Instruments, Books, Documents, Statements, Letters, Press Copies of Letters and Statements and All Other Instruments Delivered to Oliver B. Snider, Esq., of Toledo, Ohio, by Willard Parker Butler, Esq., of New York City, New York, on the First Day of June,* 1905.

1. Letter book marked 'C. Butler's letters, June, 1847 to April, 1849.'

2. Letter book marked, 'Business letters from May, 1849 to January, 1852, Charles Butler.'

3. Letter book marked 'Letters, Charles Butler, January, 1857, to August, 1860.'

4. Letter book marked 'C. Butler's letters, August, 1860, to August, 1867.'

5. Letter file marked 'Letters received, January, 1859, to December, 1849.'

6. Letter file marked 'Letters received, January, 1850, to October, 1851.'

7. Letter file marked 'Letters Mississippi from —— to ——,' the first letter being dated March 27, 1857.

8. Letter file marked on back 'Letters received Mississippi from —— to ——,' the first letter being dated April 21, 1854.

9. Bundle of miscellaneous letters from Peter Anderson, Henry Anderson, Walter Goodman, John Fitch and Morrison R. Waite to Charles Butler.

10. Envelope containing receipts of Walter Goodman, Executor, Peter Anderson, executor. Statement of account, dated September 27, 1852; original note for $7,340.10 dated October 1, 1853; draft for $2,172.70 drawn by James H. Anderson at Memphis, Tennessee, March 8, 1861, on Charles Butler, No. 12 Wall street, New York,

and stamped 'Received Payment. American Exchange National Bank.'

327 11. Bundle containing original papers Exhibit- B to G inclusive, mentioned in stipulation, bearing like date herewith; also certified copy of deed of Edson Allen, master to Henry Anderson, dated 18th day of November, 1844.

12. Release Henry Anderson to Edward Bissell.

Any other letter press copy books of Charles Butler than those above described between 1852 and 1857 have been searched for and cannot be found.

RHEA P. CARY, *Attorney.*
ROSEWELL E. MESSINGER,
By KING & TRACY,
CLAYTON W. EVERETT AND
O. B. SNIDER.
His Attorneys."

Thereupon the defendant objected to each and every section of said stipulation and said Exhibit A thereto so offered, separate and severally, and to each and every fact in each section thereof and in said exhibit on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because no proof has been offered that any of the letters or documents thereby identified or now offered in evidence were ever brought to the knowledge or notice of Calvin Bronson, or of the defendant, or of any one under whom he claims.

3. Because said evidence is incompetent to contradict the written agreement between Charles Butler and the executors and trustees of Henry Anderson, providing for the payment by note of $7,340.00 already in evidence.

4. Because it is incompetent by such proof to attack or destroy defendant's record title to the premises in controversy.

5. Because said evidence is incompetent, irrelevant and immaterial.

6. Because not proper rebuttal.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as foresaid, said sections of said stipulations and said exhibit hereinbefore set forth were received and read in evidence.

328 Thereupon the plaintiff, further to maintain the issues upon his part, offered in evidence in rebuttal section 3 of stipulation No. 3, same being as follows:

"That on May 7th, 1860, Charles Butler wrote a letter to Walter Goodman, executor, stating that he was indebted to the estate of

Henry Anderson on May 1, 1860, in the sum of nine thousand three hundred and sixty and ninety-seven hundredths dollars ($9360.97)."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because no proof has been offered that the letter therein referred to was ever brought to the knowledge or notice of Calvin Bronson, or of the defendant, or of any one under whom he claims.

3. Because said evidence is incompetent to contradict the written agreement between Charles Butler and the executors and trustees of Henry Anderson, providing for the payment by note of $7,340.00 already in evidence.

4. Because it is incompetent by such proof to attack or destroy defendant's record title to the premises in controversy.

5. Because said evidence is incompetent, irrelevant and immaterial.

6. Because not proper rebuttal.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said section 3 of stipulation No. 3 hereinbefore set forth was received, and read in evidence.

Thereupon the plaintiff, further to maintain the issues upon his part, offered in evidence in rebuttal the whole of stipulation No. 4, same being as follows:

"In the above entitled case it is hereby stipulated, that the letters written and sent by Charles Butler of New York City, to Henry Anderson of Holly Springs, Mississippi, Walter Goodman, Peter Anderson and James H. Anderson or either of them, and the letters from The Manhattan Bank of New York City, to said parties
329 or either of them, and all accounts, documents, statements and schedules accompanying and mentioned in said letters are lost or destroyed.

"That subject to such objections as to competency or relevancy and materiality as might be made against originals were they in existence and duly produced and proven in open court the letter press copies of said letters, accounts, statements, and schedules now in the possession of the defendant, mentioned in the notice of the defendant to the plaintiff, dated May 2, 1905, for the production and inspection of the original of said letters, documents, schedules and accounts may be read in evidence on the trial of this case, with the same force and effect the originals would have were they in existence, produced and proven in open court.

"But no admission is hereby made as to the competency of the

originals were they produced and proven as aforesaid, but such competency and relevancy is to be first determined by the court.

"Said copies now in the possession of said defendant shall at all reasonable times be open to the inspection of the plaintiff's counsel at the office of Clayton W. Everett, 410 Valentine —, Toledo, Ohio.

"In witness whereof the parties do sign their names to duplicates hereof by their respective counsel this 13th day of May, A. D., 1905.

"PETER ANDERSON,
By C. A. THATCHER
His Attorney.
By C. W. TRACY AND
EVERETT,
By C. W. EVERETT,
Attorneys for Defendant."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because no proof has been offered that the accounts, letters, documents, statements and schedules therein referred to were ever brought to the knowledge or notice of Calvin Branson or of
330 the defendant, or of any one under whom he claims.

3. Because said evidence is incompetent to contradict the written agreement between Charles Butler and the executors and trustees of Henry Anderson, providing for the payment by note of $7,340.00 already in evidence.

4. Because it is incompetent by such proof to attack or destroy defendant's record title to the premises in controversy.

5. Because said evidence is incompetent, irrelevant and immaterial.

6. Because not proper rebuttal.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said stipulation No. 4 hereinbefore set forth was received and read in evidence.

Thereupon, the plaintiff, further to maintain the issues upon his part, offered in evidence in rebuttal a letter from Charles Butler to Walter Goodman, same being as follows:

"No. 12 Wall Street,
"New York, 19*th March*, 1860.

"W. Goodman, Esq., Holly Springs, Miss.

My Dear Sir: I have just been to the Manhattan Bank to see if I could find the deed deposited there by you on the 9th October, 1855, of the Toledo property and found it all safe. It was left with Mr. Allaire the first teller and the envelope has the endorsement 'The property of Walter Goodman, Peter Anderson, and to be delivered on the order of either of them.' My contract with Mr. Bronson for the sale of the property is very stringent and requires me to make a title to the property with certificate of Mr. Waite that the title is free and clear and valid and to have the deed, with the certificate of title, at Toledo by the first of May. I am apprehensive that Mr. Bronson will avail of any possible chance of backing out from his contract with me. He is a perfectly responsible man, and once bound will pay for the property punctually according to his agreement, and hence it is of the first importance to me to be ready in ample time, to meet any difficulty which he may interpose. My agent, Mr. Berdan, has just been here and he has been overhauling all back taxes and I see nothing in the way of a clean title on receiving the deed from you. On the record the title is in Henry Anderson. The deed from the trustees and executors of Henry Anderson to me, and my warranty deed to Mr. Bronson makes a perfect chain going back more than twenty-two years, possession has been held during all that time by me, and
331 the taxes have been paid by me. I shall want your order on Mr. C. O. Halstead, Prest. of the Manhattan Bank, for delivery of the package containing the deed to me and if you will please direct him to open it, and to hand the deed itself to me, and take from me a receipt for it and my stipulation to return in place of it the cash payment of $2,000 to be paid by Mr. Bronson on delivery of deed, as soon as received, and also to deliver the bond and mortgage to Mr. Bronson for $15,500 for the balance of purchase to him to take the place of the deed. You will see and appreciate the importance of placing me in a position to send forward the title papers to Mr. Waite at Toledo at the earliest possible moment, that he may be fully prepared to deliver the deed with the evidence of title before the first of May and may anticipate and be prepared to obviate any exceptions which Mr Bronson may be prompted to take to the title.

"I have no doubt he will be very glad to avail of the slightest pretext to get rid of the contract. I will have the business done with perfect security to you and trust that you will give to it your immediate attention.

In haste, truly yours,
(Signed) CHARLES BUTLER."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because no proof has been offered that said letter was ever brought to the knowledge or notice of Calvin Bronson, or of the defendant, or of any one under whom he claims.

3. Because said evidence is incompetent to contradict the written agreement between Charles Butler and the executors and trustees of Henry Anderson, providing for the payment by note of $7,340.00 already in evidence.

4. Because it is incompetent by such proof to attack or destroy defendant's record title to the premises in controversy.

5. Because said evidence is incompetent, irrelevant and immaterial.

332 6. Because not proper rebuttal.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said letter hereinbefore set forth was received and read in evidence.

Thereupon the plaintiff, further to maintain the issues upon his part, offered in evidence in rebuttal Exhibit D of stipulation No. 1, same being as follows; and being agreement between Chas. Butler and W. Anderson.

"Whereas Charles Butler, of the city of New York, did in July, 1841, make and deliver to Henry Anderson, late of Holly Springs, in the state of Mississippi, deceased, his promissory note in writing whereby for value received he promised to pay the said Henry Anderson on demand the sum of twenty thousand dollars with interest which said note and interest is now due and unpaid.

"And the said Charles Butler as a collateral security for the payment of the said note and interest caused to be assigned and delivered to the said Henry Anderson a certain bond and mortgage bearing date the 19th day of June, A. D. 1838, executed and delivered by Edward Bissell of the city of Toledo in the state of Ohio, to the said Charles Butler to secure the payment of ($21,500) twenty-one thousand five hundred dollars which said mortgage was a lien on certain town lots in the city of Toledo aforesaid therein named.

"Subsequently to the assignment of said mortgage to said Anderson and by virtue of the authority therein contained and in consequence of the failure of the mortgagor aforesaid to comply with the conditions of said bond and mortgage at the request of the said Charles Butler it was foreclosed by a suit instituted in the Court of Common Pleas of Lucas county, Ohio, in the name of said Henry

Anderson as assignee as aforesaid, in which suit a decree was obtained for the sale of the said mortgaged premises. In conformity to the terms of the said decree, the said mortgaged premises were sold on the 24th day of September, 1844, at public sale at Toledo by Edson Allen a master commissioner in chancery and were bid off at said sale in the name of the said Henry Anderson for the aggregate sum of $6,921; said sale was afterwards confirmed by the court granting the decree and a deed of the premises in due form thereupon executed and delivered to the said Henry Anderson, which deed was recorded in the office of the recorder of Lucas county, aforesaid in volume 10 of deeds, pages 168, 169, 170 and 171.

"And, whereas the said Henry Anderson held and intended to hold the title to the premises above referred to in trust to
333 secure the payment of the note of the said Charles Butler, executed to him the said Anderson.

"The said Anderson having departed this life without declaring said trust in writing, leaving him surviving his two sons, William Anderson and James H. Anderson, his only heirs at law, the latter a minor, the former of full age, and the said William Anderson being desirous of carrying into effect the wishes and intentions of his deceased father, has consented to execute and deliver to the said Charles Butler, this declaration of the terms and conditions on which he holds the title to the premises above referred to remaining unsold at the date hereof.

"*This* is to say, to the following lots in the city of Toledo, viz.: Lots 1,008, 1,009, 30, 31, 32, 33, 34, 1,000, 1,001, 18, 19, 20, 21, and Water lot 992, all in the Vistula division of Toledo, as described in the deed of the said Edson Allen, master commissioner to Henry Anderson, therefore.

"Be it known that I, the above named William Anderson for and in consideration of the covenants and engagements of the said Charles Butler, hereinafter contained do hereby acknowledge and declare that my interest in the above described premises as heir at law of the above named Henry Anderson deceased, is held in trust as security for the payment of the above mentioned note of the said Charles Butler, together with the interest now due or to become due thereon, and for no other purpose whatever. Whenever the said note shall be fully paid and satisfied by the said Charles Butler as hereinafter provided, then I, the above named William Anderson, for myself, my heirs, executors and administrators do hereby covenant and agree to and with the said Charles Butler, his heirs and assigns to execute and deliver to the said Charles Butler, his heirs or assigns, at his or their request a full and complete release of all my right, title and interest in and to all or any part of the above described premises then remaining unsold and for which I may not have previously executed a release. The said William Anderson further agrees that in the event — the sale of a part or all of the above described premises at prices satisfactory to him or at such prices as shall be mutually agreed upon between him and the said Charles Butler to execute a full and ample release of his interest in the premises so

sold on the condition that the purchase money so obtained be applied to the payment of the said indebtedness of the said Charles Butler.

"And the said Charles Butler, for himself, his heirs, executors and administrators doth hereby covenant and agree to and with the said William Anderson, his heirs and assigns that he will well and truly pay to the executors of Henry Anderson the above men-
334 tioned note of twenty thousand dollars, together with all interest due or to become due thereon in manner following, that is to say:

"At the date hereof the sum of $3,376.52 and on the first day of October, eighteen hundred and fifty, the further sum of fifteen hundred dollars, with all interest then due on the said note of $20,000. On the 1st day of October, 1851, the sum of $2,000. On the 1st of October, 1852, the sum of $2,500. On the 1st of October, 1853, the sum of $4,000.00. On the 1st of October, 1854, the sum of $4,000.00. On the 1st of October, 1855, the sum of $6,000, together with all interest due on said note at the time of payment of these several installments.

"All taxes assessed or to be assessed on the above described premises are to be also paid by the said Charles Butler, whenever the same become due and payable.

"It is also understood and agreed that the amount which may hereafter be found due to the said Charles Butler from the estate of Henry Anderson, deceased, on the settlement between him and the executors of the said Anderson of the account between the said Butler and the said Anderson growing out of a contract between them in respect to commissions for warrantees of title of lands sold for the American Land Company in Mississippi shall and may be applied towards the payment of said note when the same shall be finally ascertained and adjusted between the parties interested therein, which amount added to the sum herein agreed to be paid at this date is supposed to be about equal to the amount of interest due on said note of Charles Butler on the 1st of July, 1849.

"The said Charles Butler further agrees that in the event of the default of payment of any of the above named installments or of the interest due at the time said installments are payable for the term of ninety days after the same shall become due, then the whole debt remaining unpaid shall be deemed due and payable anything herein contained to the contrary, notwithstanding.

"In witness whereof the said William Anderson and Charles Butler have hereunto set their hands and seals this tenth day of October, 1849.

CHARLES BUTLER. [L. S.]
W. ANDERSON. [L. S.]

Sealed and delivered in the presence of:
S. H. FLEETWOOD."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

335 1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because said evidence is incompetent, irrelevant and immaterial.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said Exhibit D of stipulation No. 1, hereinbefore set forth was received and read in evidence.

Thereupon the plaintiff, further to maintain the issues upon his part, offered in evidence in rebuttal Exhibit D2 of stipulation No. 1, same being as follows:

"Whereas, Charles Butler, of the city of New York, was indebted to Henry Anderson, of Holly Springs, in the state — Mississippi, in the sum of twenty thousand dollars for which said Butler gave his note dated 1st July, 1841, on which note a balance remains unpaid at this date. As security for the payment of said note said Butler assigned and delivered to the said Henry Anderson in his lifetime a certain bond and mortgage executed by Edward Bissell of Toledo, to him the said Charles Butler, which mortgage was on certain premises therein described situate in the said city of Toledo, and the same was afterwards foreclosed by proceedings in the Court of Common Pleas of the county of Lucas, state of Ohio, and the premises therein described were sold at public sale by the master commissioner appointed for that purpose by the said court, and were bid off in the name of said Henry Anderson to protect his security in said premises and a deed duly executed to him therefor, which said deed is dated the eighteenth day of November, eighteen hundrd and forty-four, and was recorded in said Lucas county, in volume 10 of deeds, pages 168, 169, 170, 171, January 16, 1845, reference being thereto had—portions of which lots described in said deed have been heretofore in the lifetime of Henry Anderson sold and conveyed by said Butler under the authority and power of said Anderson, and the portions unsold and now held under said deed is described as follows, to-wit: Town lots in the Vistula division of the city of Toledo, in the county of Lucas, state of Ohio, known and designated as lots 18, 19, 20, 21, 1,008, 1,009, 30, 31, 32
336 33, 34, 1,000, 1,001, said lots being in one block bounded northerly by Summit street, southerly by Water street, easterly by Cherry street and westerly by Lynn street. Also water lot No. 992, extending from Water street to the line of wharfing, and fronting on the Miami river one hundred and twenty-six 65-100 feet.

"And whereas the said Henry Anderson took and held the title to said mortgaged premises as security for the payment of the debt

owing by said Butler to him as aforesaid, on the payment of which said premises were to be released and conveyed to the said Charles Butler or his representatives. The said Henry Anderson died in March, 1846, not having made or executed any declaration in writing for the purpose of which said property was held, and since the death of said Henry Anderson, the said Butler has made several payments of large sums of money on account of said debt to the estate of said Henry Anderson. And whereas James H. Anderson is the only child and heir at law of the said Henry Anderson, and is willing and desirous to ex-cute a proper instrument or declaration in writing explanatory and declaratory of the facts aforesaid in respect to the said property and to carry into effect the intention of his father to the end that justice may be done. Therefore these presents witness that I, the said James H. Anderson, hereby acknowledge and declare that the said premises and every part thereof have been and are held as security for the payment of the balance which is due or which may at any time appear to be due on the said note or obligation from the said Charles Butler to the estate of said Henry Anderson, and for no other purpose or interest whatever, and on the payment of said note and interest the said premises shall and will be duly released and conveyed to the said Charles Butler, his heirs or assigns, and I, the said James H. Anderson, do hereby stipulate and covenant with the said Charles Butler, his heirs and assigns, that upon the request of said Butler, his heirs or assigns, I will execute, acknowledge and deliver any other or further assurance in the premises so that the lots of land aforesaid shall be held subject to the payment of the principal and interest of the aforesaid debt and for no other purpose.

"In witness whereof I have hereunto set my hand and seal this sixteenth day of September, eighteen hundred and fifty-one.

[SEAL.] JAS. H. ANDERSON.

Sealed and delivered in the presence of:

W. GOODMAN.
S. H. FLEETWOOD.
P. ANDERSON.

337 "STATE OF NEW YORK,
City and County of New York, ss:

"On the sixteenth day of September, eighteen hundred and fifty-one, before me a commissioner for said state of New York, appointed by the governor of the state of Ohio, to take acknowledgments of deeds and other instruments in writing to be used or recorded in said state of Ohio, personally came James H. Anderson, to me known to be the person described and named in and who executed the within instrument, and acknowledged the signing and *signing and* sealing of the same as his voluntary act.

"In witness whereof I have hereunto subscribed my name and affixed my official seal.

[SEAL.] STANLEY H. FLEETWOOD,
Commissioner, etc.

"Memorandum between Charles Butler and James H. Anderson this 1st October, 1852, witnesseth that in consideration of the payment of the said note of the said Charles Butler to the executors of the said Henry Anderson as herein agreed the time for the payment thereof is hereby extended as follows, viz.: The sum of twenty-five hundred dollars ($2,500), on the date hereof, the sum of $4,000 *dollars* on the 1st October, 1853, the sum of $4,000 on the 1st Otcober, 1854, the sum of $4,000 on the 1st October, 1855, and the balance on the first day of October, 1856, with interest at 6 per cent on the whole sum to be paid annually on the 1st October in each year and the said Charles Butler agrees to make the said payments as aforesaid and this agreement is to be taken in connection with and supplemental to the agreement of the parties hereto appended dated 16th September, 1851.

Witness our hands and seals this 1st day of October, 1852.

[SEAL.] JAMES H. ANDERSON.
[SEAL.] CHARLES BUTLER.

Witness:
S. H. FLEETWOOD.
W. GOODMAN.

"STATE OF NEW YORK,
City and County of New York, ss:

"On this first day of October, eighteen hundred and fifty-two before me, a commissioner for said state appointed by the governor of the state of Ohio, to take acknowledgments of deeds and other instruments to be recorded in said state of Ohio, personally came James H. Anderson and Charles Butler, to me known to be the grantors described in and who executed the within instrument and severally acknowledged that they did sign and seal the foregoing instrument, and that the same is their free act and deed.

"In witness whereof, I have hereunto subscribed my name and affixed my official seal.

[SEAL.] STANLEY H. FLEETWOOD,
Commissioner for Ohio in New York.

338 Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because said evidence is incompetent, irrelevant and immaterial.

Counsel for plaintiff then stated that the plaintiff offered and introduced these documents in evidence for the sole purpose of showing that the relation of mortgagor and mortgagee existed between Charles Butler and James H. Anderson up to October 1, 1852, and that Charles Butler had expressly obligated himself to pay the taxes on the property, and that the relation of mortgagor and mortgagee extends only to the life estate.

Thereupon counsel for defendant objected to the limitation which counsel for plaintiff sought to put upon the effect of this evidence, this being a question for argument.

Thereupon the court stated that the evidence was in the record for any competent purpose, and overruled said objection thereto, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him aforesaid, said Exhibit D2 of stipulation No. 1 hereinbefore set forth was received and read in evidence.

Thereupon the plaintiff, further to maintain the issues upon his part, offered in evidence in rebuttal a letter from Charles Butler to James H. Anderson, same being as follows:

"NEW YORK, *28th July*, 1858,
No. 12 WALL STREET.

"J. H. Anderson, Esq.

MY DEAR SIR: On my return from the West I found your letter on the — ult. I had received your previous letter and delayed replying to it till I had been at Toledo, where I expected to go the last of May, and had seen the property. I was prevented going there till the last of June or rather the beginning of July and now hasten to reply to your letter.

"The only possible means that I can command for the payment of the balance due to you is in the property at Toledo,
339 and my object was to see if I could make any disposition of the whole or portions of it for that purpose now, or in a short time. I had a negotiation with a party there for the sale of the ¼ part of the property mortgaged to you for $10,000 and this negotiation is yet pending. The lot which he proposed to buy for the erection of a large tobacco manufactory was 82½ feet front on Summit street by 250 feet deep on Cherry street, and to pay $2,000 cash between this and first of December, and the balance on bond and mortgage in annual payments with interest 7 per cent. One great object was to get this improvement on the property and I yet hope to effect a sale to him on some terms.

"There are about $2,000 of taxes and assessments against the property, overdue since last fall, which it has been utterly out of my power to provide for. There was no way under the sun that I could command the means. My losses of the failure of the railroad company were so enormous as to divest me of all available means of every kind for the time being and till I can by some means extricate myself. I propose now to go to Toledo in September to sell lots and provide for the payment of the taxes on this and other property there in the same condition in respect to taxes, and if it

is a possible thing to raise the means to pay off a portion or the whole of your debt by sales of property there over and above the taxes, I shall most certainly do it. I have other lots there and my purpose is to offer them all or any and from the proceeds of any to make a payment to you. You should not, however, rely on this for any cash payment you have to make. It would not be safe to do so on any account. If it should meet your views to take the property at a bona fide valuation in payment of the debt it would be a great relief to me, and from such valuation would make a liberal deduction. I have struggled to hold on to this property for many years in the hope of realizing from it some part of the large sum it has cost me, and for the first time in many years it looks to me as the time is approaching when it would be in demand at prices that would pay off the incumbrance and yield a handsome surplus.

"Some years ago I agreed with the Bethel Seamen's Church Society at Toledo to give them a lot out of this property for a church erection. They went on and have erected a handsome brick edifice and now occupy it, and having complied with the condition of the grant they want a deed, which it is proper they should have. The erection of this church has added to the value of the property and moreover has relieved from some burden of taxes. I send
340 you a rough plan or map of the property included in the mortgage to you and have marked on it the church lot and also the lot proposed to be sold to Mr. C. Bronson for $10,000 as stated herein. I have explained all this to Mr. Goodman, who is now here. I regret most sincerely the turn things have taken with me within the last year and most of all because it interfered with and defeated the provision and arrangements which I had made for the payment of this debt in full prior to the 1st January last. But the catastrophe which happened and which put all in the world I had in jeopardy was not foreseen, and could not be prevented, nor the consequence- which have followed.

In haste, truly yours,

(Signed) CHARLES BUTLER."

Thereupon the defendant objected to said evidence so offered and severally and separately to each and every part thereof, on the following grounds:

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the State Courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

2. Because said evidence is incompetent, irrelevant and immaterial because not brought to the knowledge or notice of Calvin Bronson or the defendant, or of any one under whom he claims.

3. Also, because incompetent to control, contradict or vary the

written contract with respect to payment of $7,340.00 embodied in note for said amount heretofore offered in evidence.

4. Also because incompetent to attack or destroy defendant's record title to the premises in controversy.

5. Because said evidence is incompetent, irrelevant and immaterial.

Thereupon the court overruled said objection, to which ruling the defendant then and there duly excepted; and thereupon, over the objection of defendant and subject to exception by him as aforesaid, said letter hereinbefore set forth was received and read in evidence.

Thereupon the plaintiff, further to maintain the issues upon his part, in rebuttal called as a witness OLIVER B. SNIDER, whose oath being waived, testified as follows:

341 Direct examination by Mr. CARY:

Q. Mr. Snider, you are an attorney in the city of Toledo?

A. Yes, sir.

Q. Mr. Snider, you have appeared, have you not, in the various trials that have been had of the case of Peter Anderson vs. Rosewell E. Messinger in this court and in the United States Circuit Court of Appeals for the Sixth Circuit?

(Objected to by defendant on the following grounds:)

1. Because all matters in controversy in this action have been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the State Courts described in the amended and supplemental pleadings filed by the defendant herein; and that by reason of said findings, judgments and decrees, respectively, plaintiff is estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them, against the defendant.

Thereupon the court overruled said objection, to which the defendant, by his counsel, then and there duly excepted.

A. Yes, sir; I appeared here with Captain Everett and Mr. King in the various trials.

Q. And also in the United States Circuit Court of Appeals?

(Objection by defendant on the several grounds above specified; overruled; exception by the defendant.)

A. I appeared there in the second trial, not in the first.

Q. You were on the brief that was interposed in the name of Messinger in the first trial, were you not?

(Objection by defendant on the several grounds first above specified; overruled; exception by defendant.)

A. Yes, sir; my name was on it.

Q. Mr. Snider, who have you represented in these various trials and appearances that you have just testified about?

(Objection by defendant on the several grounds first above specified; overruled; exception by defendant.)

A. I appeared for Mr. Messinger.
Q. Under his employment?

(Objection by defendant on the several grounds first above specified; overruled; exception by defendant.)

A. Well, associated with his attorneys.
Q. I asked the question whether you appeared under employment from Mr. Messinger?

342 (Objection by defendant on the several grounds first above specified; overruled; exception by defendant.)

A. I appeared generally in this litigation as Emily O. Butler's attorney and associated with the attorneys for Mr. Messinger.
Q. Your employment was by Miss Butler, was it not?

(Objection by defendant on the several grounds first above specified; overruled; exception by defendant.)

A. In the first instance
Q. And in each succeeding instance, in the various trials of this case, isn't that true?

(Objection by defendant on the several grounds first above specified; overruled; exception by defendant.)

A. I have been here to watch as far as I could the interests, contingent, of Miss Butler. She is not a party to this suit, but understanding that she might have a contingent liability, I have been here to watch that interest to the best of my ability.
Q. Mr. Snider, is it or is it not a fact that Miss Emily O. Butler is the sole heir at law of Charles Butler, deceased?

(Objection by defendant on the several grounds first above specified; overruled; exception by defendant.)

A. I understand she is.

No cross-examination.

Thereupon the plaintiff asked leave of court to file an amendment to the petition herein to make same conform to the proofs on the subject of damages for rents and profits accrued up to the time of the beginning of the suit, to which the defendant objected on the grounds hereinbefore stated in objecting to testimony with respect to said damages, which objection the court overruled, and thereupon granted plaintiff leave to file said amendment, to which ruling of the court, the defendant, by his counsel then and there duly excepted.

Thereupon the plaintiff rested in rebuttal.

Thereupon it was stipulated by and between counsel for the respective parties to this action that the denial set forth in the amended and supplemental answer filed by defendant herein should be regarded and treated as a denial to the allegations set forth in said amendment to the petition.

Thereupon the defendant, further to maintain the issues upon his part, offered in evidence in surrebuttal sections 4, 5, 6 and 7 of stipulation No. 3, same being as follows:

COPY BOUND CLOS

343 "Fourth. That on January 1, 1857, Peter Anderson, one of the executors of Henry Anderson's will, was paid by Charles Butler, the sum of four thousand dollars ($4,000.00) on the note of twenty thousand dollars ($20,000.00) made by said Butler.

"Fifth. That on May 7, 1860, there was deposited in the Manhattan Bank, of New York City, by Charles Butler, to the credit of James H. Anderson, the sum of two thousand forty-one dollars ($2,041.00) as a credit upon said note of twenty thousand dollars ($20,000).

"Sixth. That on August 9, 1860, Charles Butler mailed to James H. Anderson a check on the Manhattan Bank, of New York City, for five hundred dollars ($500.00) for credit on said note of twenty thousand dollars ($20,000.00).

"Seventh. That on February 1, 1861, there was deposited to the credit of James H. Anderson in the Manhattan Bank, of New York City, the sum of two thousand four hundred nineteen and forty-nine hundredths dollars ($2,419.49) as a credit upon said note of twenty thousand dollars ($20,000.00).

Thereupon the defendant further to maintain the issues upon his part, offered in evidence in surrebuttal from the custodian of the papers of Charles Butler the following draft and endorsement thereon:

"$2,172.70. "MEMPHIS, TENN., *March* 8, 1861.

Pay to the order of F. R. Farnsworth, treasurer, twenty-one hundred seventy-two 70-100 dollars.

Value received and charge the same to the account of

JAMES H. ANDERSON.

To Chas. Butler, No. 12 Wall Street, New York.

(Endorsed:) 744. Pay American Exchange Bank, New York, or order. F. R. Farnsworth, Treasurer.

(Stamped:) Received payment. American Exchange Bank."

Here both parties rested.

And the foregoing, together with the exhibits hereto attached and made part hereof, is all the evidence offered or introduced by either party to said action and received upon the trial of said cause, no other evidence being offered or received.

Thereupon the plaintiff moved the court to direct the jury to return a verdict for the plaintiff for the possession of the property described in the petition and for the sum of forty-six thou-
344 sand, nine hundred and four dollars ($46,904.00) of rents, to the granting of which motion counsel for defendant objected, but the court granted said motion, to which the defendant duly excepted, and the court then directed the jury to return a verdict for the plaintiff for the possession of the property described in the petition and for the sum of forty-six thousand, nine hundred and four dollars ($46,904.00), which verdict was accordingly re-

turned by the jury as appears of record herein; to all of which the defendant at the time duly excepted.

Thereupon and within three days from the rendition of said verdict, defendant filed his written motion for an order vacating and setting aside said verdict and judgment rendered herein, and to grant defendant a new trial of said cause, said motion being as follows:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff.
vs.
ROSEWELL E. MESSINGER, Defendant.

Motion for New Trial.

The defendant, Rosewell E. Messinger, moves the court for an order to vacate and set aside the verdict and judgment heretofore rendered herein, and grant defendant a new trial of said cause, for the following reasons:

1. Because of error in the assessment of the amount of recovery, same being too large.

2. Because the court admitted evidence of, and allowed plaintiff to recover for, the value and amount of the rents of the premises in controversy, for time subsequent to the commencement of said action, to which action of the court said defendant then duly excepted.

3. Because said verdict is not sustained by sufficient evidence and is contrary to law.

4. Because said judgment is not sustained by sufficient evidence and is contrary to law.

5. Because the court admitted evidence offered by the plaintiff upon the trial of said cause against the objection of the defendant to which action of the court said defendant then duly excepted.

6. Because the court excluded evidence offered by the defendant upon the trial of said cause, to which action of the court said defendant then duly excepted.

7. Because the court erred in granting plaintiff's motion for the direction of a verdict in his favor, to which action of the court the defendant then duly objected and excepted.

345 8. Because of other errors of law which occurred upon the trial of said cause, to each and all of which errors said defendant then duly excepted.

By KING, TRACY, CHAPMAN & WELLES,
Attorneys for Defendant, Rosewell E. Messinger.

Said motion having been duly argued by counsel and submitted to the court, on consideration the court denied said motion, to which ruling the defendant by his counsel then and there duly excepted.

And thereupon the defendant tenders this his bill of exceptions taken on the trial of said cause, and prays the court that same may be allowed, signed, sealed, filed and made part of the record herein, all of which is accordingly done in open court this 15th day of September, 1908.

[SEAL.] R. W. TAYLER,
Trial Judge.

(Endorsement:) September 10, 1908. Submitted to me for examination. C. A. Thatcher, R. P. Cary, Attorneys for Plaintiff. Filed September 15, 1908. Irvin Belford, Clerk United States Circuit Court, Northern District of Ohio.

June Term, A. D. 1908, to wit, September 15, 1908.

Present: The Honorable Robert W. Tayler, United States District Judge.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Journal Entry.

This 15th day of September, 1908, came the defendant, Rosewell E. Messenger, and presented to the court his bill of exceptions herein, which having been examined by the court and found in all respects to be true and correct, is hereby approved, allowed, signed and filed herein, and when filed, is ordered to be made a part of the record in the above entitled cause; and it appearing to the court and the court finding that the substance of the matters evidenced by the several exhibits attached to said bill of exceptions is fully and correctly set forth in the body of said bill of exceptions, it is, pursuant to stipulation between the parties hereto filed herein, hereby ordered that said exhibits be not copied upon the records herein.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division, June Term, A. D. 1908, to wit, November 30, 1908.

Present: The Honorable Robert W. Tayler, United States District Judge.

At Law. No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Order.

346 On application therefor and for good cause shown, leave is hereby granted the defendant, Rosewell E. Messenger, to

forthwith file a motion herein for an order vacating and setting aside the order entered herein by this court under date of September 15, 1908, denying and overruling defendant's motion to vacate and set aside the judgment entered herein in favor of plaintiff June 2, 1908, at the present term of this court, and for an order vacating and setting aside said judgment in favor of plaintiff and granting defendant a new trial herein.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

At Law. No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Motion.

Leave of court thereunto having been first duly obtained, the defendant, Rosewell E. Messenger, respectfully represents to the court that since September 15, 1908, at which date this court decided and entered its order in the above entitled action denying defendant's motion to vacate and set aside the judgment entered herein at the present term of this court, in favor of plaintiff and against defendant, and to grant defendant a new trial herein, the Supreme Court of Ohio, in proceedings in error, No. 10,689 therein, entitled Peter Anderson, plaintiff in error, vs. The United Realty Company, Rosewell E. Messenger, this defendant, and others, defendants in error, has affirmed the judgment of the Circuit Court of Lucas County, Ohio, affirming the judgment of the Common Pleas Court of said county, being the same judgment and proceedings set forth at length and pleaded by this defendant as res adjudicata herein in his amended and supplemental answer duly filed herein; that said decision was rendered and final judgment entered in said proceedings by said Supreme Court of Ohio, on November 10, 1908; that by said decision and judgment said Supreme Court finally adjudicated and determined all matters in issue in said cause and construed the will of Henry Anderson, grandfather of the plaintiff, Peter Anderson, being the same will upon which plaintiff bases his right of recovery in the above entitled action, as follows:

"Where, in a will, there is a devise to a son, and if he dies without lineal descendants, living at the time of his decease, then over, these words are not, by themselves without assistance from other parts of the will, sufficient to create an estate by implication in the lineal descendants, but the son takes a fee defeasible upon his death without lineal descendants, living at the time of his decease, and
in the event of lineal descendants living at the time of the
347 sons decease his fee becomes absolute and such descendants
have no interest under the will as against his grantee."

Defendant further respectfully represents to the court that by said

decision and judgment, the Supreme Court of Ohio has announced a general rule of property in Ohio, in full force and effect prior to and since the making of said will, which was and is binding upon, and which should control the course of decision in the Federal Courts of this state; and defendant, therefore, respectfully moves the court for an order vacating and setting aside said order entered herein by this court under date of September 15, 1908, denying and overruling defendant's motion to vacate and set aside the judgment entered herein in favor of plaintiff June 2, 1908, at the present term of this court, and for an order vacating and setting aside said judgment in favor of plaintiff and granting defendant a new trial herein.

By O. B. SNIDER,
C. W. EVERETT,
KING, TRACY, CHAPMAN & WELLES,
Attorneys for Defendant.

Exhibit "A" referred to in and made part of the foregoing bill of exceptions.

(Endorsement on motion:) No. 1897. United States Circuit Court, Northern District of Ohio, Western Division. At law. Peter Anderson vs. Rosewell E. Messinger. Motion. Filed November 30, 1908. Irvin Belford, clerk United States Circuit Court, Northern District of Ohio. King, Tracy Chapman & Welles, Attorneys.

June Term, A. D. 1908, to-wit, November 30, 1908.

Present: The Honorable Robert W. Tayler, United States District Judge.

No. 1897. At Law.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Order.

This 30th day of November, 1908, duly came on for hearing the motion of the defendant, Rosewell E. Messenger, for an order vacating and setting aside the order entered herein by this court under date of September 15, 1908, denying and overruling defendant's motion to vacate and set aside the judgment entered herein in favor of plaintiff June 2, 1908, at the present term of this court, and for an order vacating and setting aside said judgment in favor of plaintiff and granting defendant a new trial herein; and thereupon came the parties, by their respective attorneys, and said motion having been duly heard upon evidence and having been argued by counsel
348 and duly submitted, the court being fully advised in the premises, on consideration denies said motion, to which ruling the defendant, Rosewell E. Messenger, by his attorneys, then and there duly excepted.

And thereupon, on motion of the defendant, Rosewell E. Messenger, therefor, the court duly granted said defendant leave to forthwith prepare, present to the court and have allowed, signed, sealed and filed a bill of exceptions herein.

And thereupon on said November 30, 1908, came the defendant, Rosewell E. Messenger, and presented to the court his bill of exceptions herein showing the proceedings upon the hearing on said motion, which having been examined by the court and found in all respects to be true, and correct, is hereby allowed, signed, sealed and filed herein, and when filed is ordered to be made a part of the record in the above entitled cause.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

On Application for Order to Set Aside and Vacate Ruling on Former Motion for New Trial, etc.

Defendant's Bill of Exceptions.

Be it remembered that in the above entitled cause in the Circuit Court of the United States for the Northern District of Ohio: Western Division, at the June, A. D., 1908, term thereof, before the Honorable Robert W. Tayler, judge thereof presiding, the following proceedings were had, viz:

On November 30, 1908, duly came on for hearing the written motion of the defendant, Rosewell E. Messenger, this day filed herein for an order vacating and setting aside the order entered herein by this court under date of September 15, 1908, denying and overruling defendant's motion to vacate and set aside the judgment entered herein in favor of plaintiff June 2, 1908, at the present term of this court, and for an order vacating and setting aside said judgment in favor of plaintiff and granting defendant a new trial herein; and thereupon said motion was offered and read in evidence by counsel for defendant, said — being herein attached, marked "Exhibit A" and hereby made part of this bill of exceptions.

Thereupon the defendant, by his counsel, in support of said motion, offered and read in evidence a duly certified transcript of the proceedings and record of final judgment in the Supreme Court of Ohio, in cause No. 10,689 therein, entitled Peter Anderson,
349 plaintiff in error, vs. The United Realty Company, Rosewell E. Messenger, et al., defendants in error, said certified transcript being hereto attached, marked "Exhibit B," and hereby made part of this bill of exceptions.

Thereupon the defendant, by his counsel, further in support of

said motion, offered and read in evidence a duly certified copy of the syllabus of the decision of said Supreme Court of the state of Ohio in said proceedings in error No. 10,689 therein, entitled Peter Anderson, plaintiff in error, vs. The United Realty Company, Rosewell E. Messenger, et al., defendants in error, decided and announced by said court November 10, 1908, same being hereto attached, marked "Exhibit C" and hereby made part of this bill of exceptions.

And the foregoing was all the evidence offered or introduced by either party to said action and received upon the hearing on said motion; and thereupon the court, on consideration of said motion and said evidence hereinbefore referred to and attached to and made part of this bill of exceptions, overruled said motion, to which action of the court the defendant then and there duly excepted; and thereupon the defendant was duly granted leave forthwith to file herein bill of exceptions with respect to the ruling of said court upon said motion, and in accordance with said leave, the defendant now tenders this bill of exceptions to said action of the court taken upon said hearing of said motion, and prays the court that same may be allowed, signed, sealed, filed and made part of the record herein, all of which is accordingly done in open court this 30th day of November, 1908.

[SEAL.] R. W. TAYLER.

This bill of exceptions was duly submitted to and examined by us, November 30, 1908.

R. P. CARY,
C. A. THATCHER,
C. H. TRIMBLE,
Attorneys for Plaintiff.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897. At Law.

PETER ANDERSON, Plaintiff.
vs.
ROSEWELL E. MESSINGER, Defendant.

Motion.

Leave of court thereunto having been first duly obtained, the defendant, Rosewell E. Messenger, respectfully represents to the court that since September 15, 1908, at which date this court decided and entered its order in the above entitled action denying defendant's motion to vacate and set aside the judgment en-
350 tered herein at the present term of this court, in favor of plaintiff and against defendant, and to grant defendant a new trial herein, the Supreme Court of Ohio, in proceedings in error No. 10,689 therein, entitled Peter Anderson, plaintiff in error, vs. The United Realty Company, Rosewell E. Messenger, this defendant,

and others, defendants in error, has affirmed the judgment of the Circuit Court of Lucas county, Ohio, affirming the judgment of the Common Pleas Court of said county, being the same judgment and proceedings set forth at length and pleaded by this defendant as res adjudicata herein in his amended and supplemental answer duly filed herein; that said decision was rendered and final judgment entered in said proceedings by said Supreme Court of Ohio, on November 10, 1908; that by said decision and judgment said Supreme Court finally adjudicated and determined all matters in issue in said cause and construed the will of Henry Anderson, grandfather of the plaintiff, Peter Anderson, being the same will upon which plaintiff bases his right of recovery in the above entitled action, as follows:

"Where, in a will, there is a devise to a son, and if he dies without lineal descendants, living at the time of his decease, then over, these words are not, by themselves without assistance from other parts of the will, sufficint to create an estate by implication in the lineal descendants, but the son takes a fee defeasible upon his death without lineal descendants, living at the time of his decease, and in the event of lineal descendants living at the time of the son's decease his fee becomes absolute and such descendants have no interest under the will as against his grantee."

Defendant further respectfully represents to the court that by said decision and judgment, the Supreme Court of Ohio has announced a general rule of property in Ohio, in full force and effect prior to and since the making of said will, which was and is binding upon, and which should control the course of decision in the Federal Courts of this state; and defendant, therefore, respectfully moves the court for an order vacating and setting aside said order entered herein by this court under date of September 15, 1908, denying and overruling defendant's motion to vacate and set aside the judgment entered herein in favor of plaintiff June 2, 1908, at the present term of this court, and for an order vacating and setting aside said judgment in favor of plaintiff and granting defendant a new trial herein.

By O. B. SNIDER,
351 C. W. EVERETT,
KING, TRACY, CHAPMAN & WELLES,
Attorneys for Defendant.

Exhibit "A" referred to in and made part of the foregoing bill of exceptions.

(Endorsement on motion.) No. 1897. United States Circuit Court, Northern District of Ohio, Western Division. At Law. Peter Anderson vs. Rosewell E. Messenger. Motion. Filed November 30, 1908. Irvin Belford, Clerk, United States Circuit Court, Northern District of Ohio. King, Tracy, Chapman & Welles, Attorneys.

Supreme Court of the State of Ohio.

Of the Term of January, A. D. 1908, to-wit, Tuesday, November 10th.

STATE OF OHIO,
City of Columbus:

No. 10,689.

PETER ANDERSON, Plaintiff,
vs.
THE UNITED REALTY COMPANY et al.

Error to the Circuit Court of Lucas County.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Lucas county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court that the judgment of the said Circuit Court be and the same is hereby affirmed; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant- in error recover from the plaintiff in error their costs herein expended to be taxes at $\$$——.

Ordered, that a special mandate be sent to the Court of Common Pleas of Lucas county, to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the clerk of the Circuit Court of Lucas county, "for entry."

Exhibit "B," referred to in and made part of the foregoing bill of exceptions.

UNITED STATES OF AMERICA,
State of Ohio,
Franklin County, ss:

I, Joseph G. Obermeyre, clerk of the Supreme Court of the state of Ohio, do hereby certify that Exhibit "A," hereto attached and hereby made part hereof, is a true, perfect and complete copy of final judgment rendered and entered on the journal of the Supreme Court of the state of Ohio, on the 10th day of November, 1908, in a certain case pending in said court, wherein Peter Anderson
352 was plaintiff, and the United Realty Company et al., were defendants.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Columbus, in said county in the state of Ohio, this 24th day of November, A. D., 1908.

[SEAL.] JOSEPH G. OBERMEYRE, *Clerk.*

STATE OF OHIO,
Franklin County, ss:

I, James L. Price, presiding judge of the Supreme Court of the state of Ohio, do hereby certify that Joseph G. Obermeyre, who signed the above certificate, was at the time of signing the same, and is now, clerk of said Supreme Court of the state of Ohio, duly commissioned and qualified; that said court is a court of record, having a clerk and seal, that said attestation is in the form and by the proper officer, according to the laws of the state of Ohio; and that the above signature of said clerk is genuine.

Witness my hand and seal, at Columbus in said county of Franklin, in the state of Ohio, this 24th day of November, A. D., 1908.

JAMES L. PRICE,
Presiding Judge of the Supreme Court of the State of Ohio.

No. 10689.

ANDERSON
vs.
THE UNITED REALTY COMPANY et al.

Error to the Circuit Court of Lucas County.

SUMMERS, *Judge:*

2. Where, in a will, there is a devise to a son, and if he dies without lineal descendants, living at the time of his decease, then over, these words are not, by themselves, without assistance from other parts of the will, sufficient to create an estate by implication in the lineal descendants, but the son takes a fee defeasible upon his death without lineal descendants living at the time of his decease, and in the event of lineal descendants living at the time of the son's decease his fee becomes absolute and such descendants have no interest under the will as against his grantee.

Judgment affirmed.

Price, C. J., Shauck and Spear, JJ., concur. Davis, J., dissents.

(No. 10,689—Decided November 10, 1908). Exhibit "C" referred to in and made part of the foregoing bill of exceptions.

Supreme Court of Ohio.

STATE OF OHIO,
City of Columbus, ss:

I, Joseph G. Obermeyre, clerk of the Supreme Court of the
353 state of Ohio, do hereby certify that the foregoing is a true and correct copy of the second clause of the syllabi in the case of Peter Anderson vs. United Realty Company et al., filed in the clerk's office of the Supreme Court of the state of Ohio.

In witness whereof, I have hereunto subscribed my name this 28th day of November, A. D., 1908.

[SEAL.] JOSEPH G. OBERMEYRE.
Clerk Supreme Court of Ohio.
By W. G. BARTHALOW, *Deputy.*

STATE OF OHIO,
City of Columbus, ss:

I, James L. Price, chief justice of the state of Ohio, do hereby certify that Joseph G. Obermeyre, whose genuine signature is attached to the foregoing certificate of attestation, now is, and was at the time of signing and sealing the same, the duly appointed, qualified and acting clerk of the Supreme Court of Ohio, and keeper of the seal and records thereof, and that his attestation is in due form of law.

In witness whereof, I have hereunto subscribed my name this 28th day of November, A. D., 1908.

JAMES L. PRICE.
Chief Justice, Supreme Court, State of Ohio.

STATE OF OHIO,
City of Columbus, ss:

I, the undersigned, Joseph G. Obermeyre, clerk of the Supreme Court of the state of Ohio, do hereby certify that James L. Price, whose genuine signature is attached to the last foregoing certificate of attestation, now is, and was at the time of signing the same, a duly elected, qualified and acting judge of the Supreme Court of Ohio, and the Chief Justice thereof.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court this 28th day of November, A. D., 1908.

[SEAL.] JOSEPH G. OBERMEYRE.
Clerk Supreme Court of Ohio.
By W. G. BARTHALOW, *Deputy.*

(Endorsement:) No. 1,879. United States Circuit Court, Northern District of Ohio, Western Division. At law. Peter Anderson vs. Rosewell E. Messinger. Defendant's Bill of Exceptions on Application for Order to set aside and vacate ruling on former motion for new trial, etc. Filed, November 30, 1908. Irvin Belford, clerk United States Circuit Court, Northern District of Ohio.

June Term, A. D., 1908, to-wit: November 30, 1908.

Present: The Honorable Robert W. Tayler, United States District Judge.

354 PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Journal Entry.

This day this case came on further to be heard, and the plaintiff in open court offered to and did remit from the personal judgment recovered herein June 2, 1908, all in excess of the sum of $21,650.00; the said sum of $21,650.00 being composed of $19,978.00 rents and profits received by the defendant from September 16, 1902, up to June 2, 1908, from the land described in plaintiff's petition exclusive of improvements, and also the sum of $1,672.00, interest accruing upon said rents and profits from the time the same were received by the defendant since the commencement of this action, up to June 2, 1908, the defendant insisting upon the invalidity of said judgment so reduced.

June Term, A. D., 1908, to-wit: November 30, 1908.

Present: The Honorable Robert W. Tayler, United States District Judge.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSINGER, Defendant.

Journal Entry.

This day came the parties in open court, by their respective attorneys, and thereupon this cause came on for hearing before the court, upon the written application filed by the defendant Rosewell E. Messenger for the valuation of the improvements and assessment of damages under statutes for relief of occupying claimants, upon the following described premises, namely:

Lots numbered twenty (20), twenty-one (21), except the southeast nineteen (19) feet of the southwest eight- (80) feet thereof, thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), ten hundred and eight (1,008), and ten hundred and nine (1,009), all in the Vistula division of the city of Toledo, county of Lucas, state of Ohio.

And the court having heard said application upon the evidence produced and offered in support thereof, upon consideration is of the opinion and finds that the said defendant, Rosewell E. Messenger, is entitled to the relief applied for therein.

It is therefore ordered that further proceedings in the premises be allowed according to the provision of the statutes in such cases

made and provided. To all of which findings and order the plaintiff then and there in open court duly excepted.

Thereupon the plaintiff in open court demanded that the case proceed at once for the determination of the rights of the
355 parties under the occupying claimant law, and the defendant's said written application, said plaintiff demanding a jury for the trial of said questions, but the defendant asked that further proceedings under said occupying claimant law be postponed to enable the defendant to carry the main case to the Circuit Court of Appeals on error, and until said Circuit Court of Appeals shall have decided such error proceedings; but the court granted the requests of plaintiff and refused that of defendant and ordered that the case proceed at once under the provisions of said occupying claimant law, to which action of the court the defendant then and there in open court duly excepted.

And thereupon both parties, in open court, consented to waive a jury and submit their evidence to the court, it being stipulated and agreed by and between said parties, by their respective attorneys, that such waiver and submission shall in no wise waive, prejudice, affect or defeat the right of the defendant to review the proceedings and judgment of said Circuit Court herein, before the Circuit Court of Appeals upon proceedings in error, or by further proceedings, should any such be had and entertained, in the Supreme Court of the United States to review the last judgment of the Circuit Court or any of the judgments herein of the Circuit Court of Appeals.

Thereupon, this cause came on for trial before the court without a jury, and the court having heard the evidence and being fully advised in the premises finds as follows:

1. That the reasonable value of all permanent and valuable improvements made on said land involved in this action by the defendant and those under whom he claims title, previous to the defendants receiving actual notice of the adverse claim of plaintiff, was and is seventy-five thousand ($75,000.00) dollars.

2. That no waste has been committed or damage done to said land by the defendant or those under whom he claims.

3. That the value of the said land at the time said judgment was rendered was and now is one hundred thousand ($100,000.00) dollars.

4. That the value of said land and said improvements at the time the judgment was rendered in this action was and now is one hundred and seventy-five thousand dollars ($175,000.00).

5. That at the time said judgment was rendered, the net annual rental of said land, without said improvements was and is thirty-five hundred dollars ($3,500.00), as stipulated in open court by
356 counsel for both parties and that the total net rents and profits of said land from the commencement of this action down to and including the time of the rendition of the judgment, being from December 30, 1904, to June 2, 1908, (three years, five and one-tenth months), amounts to eleven thousand nine hundred and eighty-seven and 46-100 dollars ($11,987.46), and that said rents from the commencement of this action, down to this date, amounts to thirteen thousand four hundred and sixteen and 60-100 dollars ($13,-

416.60), that the annual rents and profits of said land from the time of the commencement of this action up to and including the trial thereof, amounting as aforesaid to eleven thousand nine hundred and eighty-seven and 46-100 dollars ($11,987.46), are included in the judgment of twenty-six thousand five hundred dollars ($26,500.00) and interest, rendered in favor of plaintiff against the defendant.

6. That after deducting from the said seventy-five thousand dollars ($75,000.00), the value as aforesaid of said improvements, the said thirteen thousand four hundred and sixteen and 60-100 dollars ($13,416.60), the value of the said rents from the time of the commencement of this action, down to the present time, received as aforesaid by defendant, there remains a balance of sixty-one thousand five hundred and eighty-three and 40-100 dollars ($61,583.40), being the excess of the value of said improvements over said rents, and which said defendant is entitled to receive, before a writ of possession issues in this action against him.

7. The court further find that the plaintiff, Peter Anderson is entitled to elect either to pay said defendant, Rosewell E. Messenger the said sixty-one thousand five hundred and eighty-three and 40-100 dollars ($61,583.40), being the balance of the value of said improvements after deducting said rents received by defendant, or to demand of said defendant Messenger the said one hundred thousand dollars ($100,000.00), the value of the said land without the improvements assessed as aforesaid, and tender to said defendant a warranty deed of said land within the time hereinafter fixed by the court, and in case the said plaintiff so elects he shall deposit his deed to said defendant for said premises, with the clerk of this court.

It is therefore ordered and adjudged by the court that on the plaintiff's paying to the defendant, the sixty-one thousand five hundred and eighty-three and 40-100 dollars ($61,583.40), balance of the value of said improvements after deducting the said rents, or on the plaintiff's tendering a duly executed warranty deed of said premises to said defendant, and the failure thereafter for thirty (30)
357 days of said defendant to pay to plaintiff said one hundred thousand dollars ($100,000.00), the value of said lands without the improvements, that a writ of possession of said real estate issue in this action to put the plaintiff in possession of said lands. That until the plaintiff makes his said election and either pays to plaintiff the said sixty-one thousand five hundred and eighty-three and 40-100 dollars ($61,583.40) for said improvements, or tenders his warranty deed to said defendant for said premises and the said defendant for thirty (30) days thereafter fails to pay to plaintiff said one hundred thousand dollars ($100,000.00) that no writ of possession issue.

It is further ordered and adjudged by the court that the plaintiff shall have thirty (30) days after the time has expired for the prosecution by the defendant of proceedings in error to review the judgment entered in this action, within which time the plaintiff may make his election as herein provided under the occupying claimant statutes of Ohio, and that during all of said time all further proceedings under said judgment shall be stayed.

It is further ordered and adjudged by the court that should the Circuit Court of Appeals affirm the judgment heretofore entered in this action in behalf of the plaintiff, sustaining plaintiff's title to the property in controversy, then plaintiff shall have seventy-five (75) days after decision by, and the filing of the written opinion in the Circuit Court of Appeals upon writ of error taken herein, within which time plaintiff may exercise his election herein to either pay for said improvements or tender a deed for the land without the improvements and no writ or possession or execution shall issue in this action until after the expiration of said seventy-five (75) days, unless the plaintiff in the meantime has elected to pay for said improvements prior to the expiration of said seventy-five (75) days, and in the event of proceedings for review of this action by the Supreme Court of the United States on certiorari or otherwise, the time mentioned for the plaintiff's election shall be extended, so that the election therein mentioned shall not be made until thirty (30) days after final action by the Supreme Court of the United States, and thirty (30) days after the time has expired for application for rehearing in said Supreme Court, or thirty (30) days after the final action of the Supreme Court thereon, provided rehearing is granted by said court, and neither writ or possession or execution shall issue until the expiration of such time.

It is further ordered, adjudged and decreed by the court
358 that in the event the plaintiff elects to convey said real estate to defendant, the defendant shall have thirty (30) days in which to pay said money after the deed from plaintiff to defendant has been filed with the clerk of this court, and which money may be paid either to the clerk of this court for plaintiff, or plaintiff himself or to any one of his counsel in this action.

And thereupon the defendant, by his counsel, severally and separately duly excepted to each and all of the foregoing findings, orders, judgments, and decrees of said court.

And it approving that part of the improvements on a portion of said premises, has recently been damaged by fire, leave is hereby given each of said parties within the June, 1908, term, to apply to the court for a determination of the proportionate values of the several improvements on said premises before said fire.

And thereupon on oral application and by stipulation between counsel for both parties, the court finds that the values of the improvements upon the premises in controversy herein before said fire, and for the purposes of said proceedings are as follows:

The Calvin Block	$61,000.00
The Warehouse Building	5,000.00
The Old Factory Bldg	9,000.00
Making a total of	$75,000.00;

the two latter buildings being those damaged by recent fire, it being found and ordered that the plaintiff, Peter Anderson, has no interest in the insurance on said damaged improvements, and no interest in or control over any salvage which the defendant, Rose-

well E. Messenger, may be able to realize from said damaged improvements, to which latter finding as to insurance and salvage, the said plaintiff excepts.

And it is hereby further found and ordered that the amount of $75,000.00 hereinbefore ordered to be paid, less net annual rents as hereinbefore found, to the defendant by the plaintiff in the event of the election by the latter to take the entire property be and the same is hereby reduced to $51,000.00, less such annual rents as hereinbefore found, and it is accordingly ordered that upon such election being so made and said sum of $51,000.00, less the net rentals as hereinbefore found, to-wit, $13,413.60, leaving a balance of $47,583.40, being paid by the plaintiff to the defendant, writ of possession shall issue, subject to the conditions hereinbefore provided and the several objections and exceptions hereinabove entered by said parties, respectively.

359 In the Circuit Court of the United States, for the Northern District of Ohio, Western Division.

No. 1897. At Law.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Assignment of Errors.

Rosewell E. Messenger, the defendant in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of said cause, to-wit:

I. The court erred in denying and overruling defendant's motion to strike out certain parts of plaintiff's reply herein to defendant's amended and supplemental answer.

II. The court erred in denying and overruling defendant's motion for an order staying further proceedings in the above entitled action, for the reasons set forth in said motion, and also in ordering and requiring that the trial of said cause should proceed forthwith.

III. The court erred in the admission of evidence offered by the plaintiff in the following instances, to-wit:

1. In receiving in evidence section 1 of stipulation No. 1 herein, the substance thereof being that on May 19, 1838, Edward Bissell was the owner in fee simple and was in the possession of certain real estate in Toledo, Ohio, the title to a part of which is in controversy in this action, and held said title by a regularly executed chain of conveyance in fee simple from the government of the United States.

2. In receiving in evidence section 2 of stipulation No. 1 herein, the substance thereof being that on May 19, 1838, said Edward Bissell and wife duly executed and delivered a mortgage in due form of law of said date to Charles Butler, upon the real estate the

title to which is in controversy herein, to secure the payment of a certain bond of said Edward Bissell to said Charles Butler, executed on the same date for $21,500.00, payable at the office of the Manhattan Company of the city of New York within one year from the date of said mortgage, with interest at the rate of seven per cent. per annum; that said mortgage was duly filed for record May 19, 1838, and was duly recorded in the records of mortgages of Lucas county, Ohio; that on September 23, 1841, said Charles Butler made an assignment of said mortgage to Henry Anderson in the following words and figures, viz:

"Assignment: I hereby assign this mortgage to Henry Anderson on certain trusts set forth in a deed this day made.

September 23, 1841.

CHARLES BUTLER."

360 Which assignment was duly recorded on the margin of the record of said mortgage, in Lucas county, Ohio, on September 30, 1843.

3. In receiving in evidence section 3 of stipulation No. 1 herein, the substance thereof being that on September 19, 1843, said Henry Anderson, assignee of said Bissell-Butler mortgage, filed his bill in chancery in the Common Pleas Court of Lucas county, Ohio, to foreclose said mortgage, said Henry Anderson being complainant in said action, and Edward Bissell and others being defendants therein; that said bill alleged the execution of said Bissel bond and mortgage and the non-payment thereof but made no allegations against Charles Butler except to allege the assignment of said mortgage by said Charles Butler to said Henry Anderson, and prayed that writ of subpœna might issue against the defendants in said action, that an accounting might be had, and the defendants be forever barred and foreclosed from all right and equity of, in and to said mortgaged premises, and for other equitable relief; that all the defendants in said action except Charles Butler were either duly served with subpœna or entered their appearance in said action; that said Charles Butler was not served with subpœna or other process and in no manner entered his appearance in said action, and said court in said action in no manner acquired jurisdiction over said Charles Butler; that on April 1, 1844, a decree was entered in said action, ordering said premises advertised and sold according to law for the payment of $29,139.01, found due complainant, Henry Anderson, on said bond and mortgage from the defendant Edward Bissell; that a master commissioner was appointed to sell said mortgaged premises, and afterward sold same, including the real estate involved in this action, to said complainant, Henry Anderson, at the price of $6,921.00, which sale was confirmed by the court, and the commissioner was ordered to convey said real estate in fee simple to said purchaser, Henry Anderson, his heirs and assigns forever; that on November 18, 1844, said master commissioner executed his deed to said Henry Anderson, conveying said premises to him, which deed was thereafter duly recorded in the office of

the recorder of deeds of Lucas county, Ohio; and that all the proceedings in said foreclosure suit were regular and legal, excepting the failure or omission to serve Charles Butler with subpoena, or in some manner acquire jurisdiction as to him.

4. In receiving in evidence section 4 of stipulation No. 1 herein, the substance thereof being that Henry Anderson at the time of his death, was a resident of Holly Springs, Marshall county,
361 Miss., and executed his last will and testament February 28, 1846; that on April 3, 1846, said Henry Anderson died, after which his said last will and testament was duly probated and recorded in and by the Probate Court of Marshall county, Miss., a court of competent jurisdiction; that afterward a duly authenticated copy of said last will and testament, with the proceedings admitting it to probate and record, taken from the records of said Probate Court of Marshall county, Miss., was filed in the Probate Court of Lucas county, Ohio, and by it was duly admitted to probate and record as a will from another state, and then and thereby became and now is the last will and testament of said Henry Anderson, deceased and is in full force and effect; a true, full and correct copy of said will being as follows:

"I, Henry Anderson, do make and ordain this to be my last will and testament. I declare my domicile to be the town of Holly Springs, Marshall county, state of Mississippi. I revoke the will made by me on the 3rd of March, 1837, and all other wills, if any there be.

"Item. I give, devise and bequeath to Peter Anderson, Walter Goodman and Peter W. Lucas all my property, both real and personal, legal and equitable in possession, reversion or remainder, and all claims and demands whatsoever, except such right, title or claim to land, money or choses in action as I may be entitled to as one of the agents of the American Land Company and as one of the stockholders of said company; this property they shall hold in trust and if one or more of them die, the survivors or survivor shall hold in trust for the following purposes; they shall pay my debts, other than such as may be owing to the American Land Company, out of the moneys on hand and such property as may be sold least injurious to my estate. I wish them to collect debts due to me and apply to this purpose. They may, if they think fit, and can, obtain an extension of time on any debt, and they may pledge my property to raise money to pay debts. They may sell for cash or on credit, and if at any time, they have funds on hand not required for debts or legacies they may invest the same. They shall have full power to make titles for property sold and to pay charges for preservation and in all respects have the power of owners but always as trustees. I have entire confidence in each of them and therefore I give each the power of all, so that each may do separately what all acting together may do, except in making investments; in that I wish all to join. The annual accounts of my said trustees signed by their
362 respective names shall be binding on my heirs and shall be conclusively so unless error or fraud be clearly established. I have directed the payment of debts, other than what I may

owe the American Land Company. I exclude the debts to the company, because that is subject to an account with the company and I do not wish my trustees to make payments before that account is adjusted. The adjustment of that account and the direction and management of the affairs of the company so far as I have power, right or interest, I place in the hands of Peter Anderson and Walter Goodman and when they have finally closed it, it shall become a part of the trust created by this article of my will and subject to the control of my said trustees. By saying 'it shall become a part of the trust' I mean the effects and proceeds that I may be entitled to as stockholder and agent of the company.

"Item. As agent of the American Land Company jointly with my brother I am entitled to an account with the trustee, and it is my will that this claim for an account, and all rights, claims and powers growing out of any contract or contracts with the trustees do vest in Peter Anderson and Walter Goodman as I have before said. They shall have power to settle with the trustees immediately or at such time as they may think best, and they shall be entitled to receive conveyances of land, should a division of land take place, and should the notes of company be divided, they shall be entitled to receive the same. The lands they may receive shall be taken to them as trustees of this my will. They shall have power to execute all papers necessary for a settlement of the agency and all papers executed by them shall be binding on my heirs. When this business is finally closed, I direct that they make out and sign a schedule of the property received on account of said interest and an account explanatory of the settlement, and the same shall be taken as a proper inventory and the property therein contained shall thereafter become vested in my trustee created by the first clause of my will, but if there be real estate therein contained, and the same stand in their name, as trustees, that is in the name of Peter Anderson and Walter Goodman as above stated, a title from them shall be good and sufficient to a purchaser. My intention being that this interest shall only come under the administration of the trustees first created and my executors hereinafter named from and after the time such interest is ascertained by a final close with the company. I have acted as agent for the trustees of the American Land Company in respect to the lands of the company in the state of Arkansas and elsewhere. What may be due me for such
363 services is a claim that I desire to go to said Peter and Walter and not to my trustees first named. It forms a portion of my claims against the company which I wish settled on the final settlement with them. I suppose that I have made myself fully understood, but for greater certainty I repeat that my wish is that nothing be taken from the company interest for debts or legacies unless for such debts as are connected with the company. At the same time if my other property cannot pay my debts or can not pay them without injury, and it be found that it would not be unjust to withdraw funds from the company interest, then it may be done, not otherwise. When my interest in the company is finally ascertained it shall, as I have said become a part of the trust first created,

and the said Peter W. Lucas shall indorse his acceptance of the schedule of the two trustees who have signed it. I give to each, that is to Peter Anderson and Walter Goodman, severally the same powers that both are invested with. In both of the trusts created by this will my trustees shall not be required to give security, nor shall they be liable for each other and their accounts signed by them respectively shall be evidence binding on my heirs of the correctness unless error or fraud be clearly shown.

"Item. It is my will that when my son William arrives at the age of twenty-one years the trustees of the first and general trust shall deliver to him a settlement, if the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one-half of my property, reserving thereout two-fifths parts of said moiety, by valuation on which my said trustees shall hold in trust and properly invest and pay over to him at the age of twenty-five years. If my interest in the American Land Company be not brought into the general trust at the time William becomes twenty-one, but is brought in any time before he arrives at twenty-five, so soon as brought in, two-fifths shall be deducted therefrom and invested and paid over to him at twenty-five, the other three-fifths he shall have as soon as paid in. I find the above does not express my will in this: when I say two-fifths shall be deducted from the interest I may have in the Land Company for investment and three-fifths to be paid to him, I mean twofifths of a moiety shall be deducted and three-fifths of a moiety paid over.

"It is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son, James at the respective period of twenty-one and twenty-five years of age being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the
364 regulations laid down concerning the same.

"If either of my sons die without lineal descendants the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants then one-half both of the decedents' original portion as well as one-half of the portion taken by survivorship shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother, Peter, be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving then the share shall go to my other brothers and sisters surviving at the time of such decease of my son. I make the following explanations: The limitations over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years respectively.

The above limitations over shall give way to the provision of such will.

"Item. I entered into a contract with the American Land Company, to warrantee title to such lands of the company as might be sold, and it so is that many bonds are now out binding me to such warrantees. I give to Peter Anderson and Walter Goodman or either of them the power to execute deeds to carry out such warrantees, and I declare that the name of either with the seal of either to such deeds shall bind my heirs, executors and administrators. It is also the case that I hold lands in common with Daniel Saffarans. It is important that these lands be sold as purchasers may offer. My undivided half interest has already by this my will been devised to my general trustees. I declare that they or either of them shall have power to convey with warrantee. This power I presume they have by the first clause of my will, which vests the title in them. I only mention it here for greater certainty.

"Item. If my brother Peter, desires to keep up a household in this place, I bequeath to him the use of my house, out houses, stables, lot, household furniture, books, horses, carriages and whatever belongs to the household establishment, and also all my slaves or such of them as he may desire to have. I do not require that any inventory or appraisement of them be made, but on the breaking up of
365 such household, he shall make out an inventory of such as remain unconsumed by use, and my other two trustees shall endorse an acceptance thereof after which time the property in such inventory shall go into the general trust and be subject to all the regulations therein laid down.

"Item. I give to my niece Caroline, daughter of my brother William, one thousand dollars, payable after my debts are satisfied. I direct my executors to pay her sixty dollars per annum as interest thereon from the time of my death until paid.

"Item. I give to my niece Rucellen, daughter of my brother Robert, two thousand dollars payable after my debts are satisfied and I direct my executors to pay her one hundred dollars as interest thereon from my death until paid.

"I have directed that a portion of my property shall be placed in the hands of my sons on their arriving at twenty-one, and I have directed that my trustees shall have the power to procure extension of my debts, and I have made the payment to my sons dependent on the payment of my debts. Now on reconsideration it occurs to me that it may so happen that there will be outstanding accounts at the time my sons arrive at twenty-one, and yet it might be in no wise injurious or improper to place my sons in possession of a part of what may be coming to them. My trustees are therefore, authorized, if they think fit, to let them have a portion of what is coming to them at twenty-one even though some debts may remain unpaid. The amount of such portion shall be according to the discretion of my trustees. It shall not exceed the amount that is limited to them on the payment of debts, nor ought it to be an amount that would jeopardize their payment.

"Remark. If the payment of the interest on the legacies jeopardize the payment of debts, the payment of such interest must cease without prejudice however to the right of the legatees to have the interest at the time they may be entitled to the principal. I further say that if the bequests to my brother Peter of the use of my household and slaves be found inconveniently to impair the capacity of the executors or trustees to pay debts, the use shall cease and no rights shall arise to him by such lapse or ceasing of the bequest.

"I give to my son William my diamond ring. I give to my son James the watch which my son William wears, which belonged to his mother.

"I appoint my brother Peter to be guardian of my sons and I direct that no security be required of him.

366 "I appoint my brother Peter and Walter Goodman and Peter W. Lucas to be the executors of this, my will, and direct that no security be required of either of them.

"In testimony that this is my will, I have hereto affixed my seal and *and* have subscribed my name and written my name in the margin this 28th day of February, 1846.

[SEAL.] HENRY ANDERSON.

"We, the undersigned, attest that Henry Anderson signed and sealed this instrument in our presence and declared it to be his last will and we have subscribed the same in his presence and in the presence of each other.

Z. M. PHELPS.
H. M. LUSHER.
ISAAC SAFFARANS."

5. In receiving in evidence section 5 of stipulation No. 1, herein, the substance thereof being that said Henry Anderson left surviving him his two sons, his only heirs at law, to-wit: William Anderson, born February 12, 1828, and James H. Anderson, born June 25, 1831; that said William Anderson died intestate in January, 1850, unmarried and without issue.

6. In receiving in evidence section 6 of stipulation No. 1, the substance thereof being that said James H. Anderson, surviving son of Henry Anderson, died intestate at the city of Memphis, in the state of Tennessee, on September 16, 1902, leaving surviving as his only child and only heir at law, the plaintiff, Peter Anderson, who was born August 27, 1859, and who is the grandson and only grand child and only living descendant of the said Henry Anderson, deceased.

7. In receiving in evidence section 7 of stipulation No. 1, herein, the substance thereof being that the property described in plaintiff's petition and involved in this action is now and was at the commencement of this action worth over $100,000.00, and that the defendant, Rosewell E. Messenger, is now and ever since the 16th day of September, 1902, has been in the actual possession of said real estate, and during all of said time has received the rents, issues and

profits thereof and at all times since said date has refused and still refuses to surrender said real estate to plaintiff or to account to him for said rents, issues and profits or any part thereof.

8. In receiving in evidence section 8 of stipulation No. 1, herein, the substance thereof being that at the commencement of this action the plaintiff, Peter Anderson, was and is a resident and citizen of Memphis, Tennessee, and the defendant, Rosewell E. Messenger, a resident and citizen of Lucas county, Ohio.

367 9. In receiving in evidence section 8 of stipulation No. 1 herein, the substance thereof being that the gross income to defendant from the property in controversy from September 27, 1904, the date of the filing of the petition herein, was $30,000.00; that during said period, defendant paid for and on account of said property the following sums:

Taxes and assessments	$8,250.00
Insurance and repairs	3,500.00
For water rent, electric light, coal for heating said building and janitor service	5,250.00
Total	$17,000.00

That the gross income to defendant from said property from December 27, 1904, to June 20, 1905, was $6,500.00;

That during said period of about six months, defendant paid for and on account of said property the following sums:

Taxes and assessments	$1,650.00
Insurance and repairs	750.00
For water rent, electric light, coal for heating said building and janitor service	1,100.00
Total	$3,500.00

10 In receiving in evidence section 8 of stipulation No. 3, herein, the substance thereof being that the parents of Henry Anderson, died some years prior to the date of his death.

11. In receiving in evidence statement furnished by the defendant, the substance thereof being that the net rents received from the property, the title to which is in controversy herein, in its improved state, between June 20, 1905, and December 5, 1907, amounted to $21,500.00, and that the expenses and receipts during said period were uniform.

IV. The court erred in excluding and rejecting evidence offered by the defendant upon said trial in the following instances, to-wit:

1. In excluding and rejecting duly certified copy of duly executed and recorded deed from the city clerk of Toledo, Ohio, to Charles Butler, dated March 26, 1860, said deed reciting and evidencing in substance that the treasurer of said city on December 27, 1849, did sell, according to the provisions of the charter and ordinances of said city, in such case made and provided, to Charles M. Dorr, lot twenty in the Vistula division of the city of Toledo, Ohio for the

Vistula grade tax charged thereon, which amounted to $66.54,
forthwith paid by said purchaser to said city treasurer; that
368 more than two years had elapsed from the date of said sale;
and said premises not having been redeemed, and the certificate of said sale to said Charles M. Dorr, having been assigned and transferred to said Charles Butler, and having been produced to said city clerk of the city of Toledo, with the endorsement of said city treasurer thereon, that no money had been deposited with him for the redemption thereof, that, in consideration of the premises and on request of said Charles Butler, said Patrick J. Monahan, clerk of the city of Toledo, granted and assigned to said Charles Butler, his heirs and assigns forever, said above described premises, to have and to hold same to the proper use of said Charles Butler, his heirs and assigns forever.

2. In excluding and rejecting duly certified copy of duly executed and recorded deed from the city clerk of Toledo, Ohio, to Charles Butler, dated March 26, 1860, said deed reciting and evidencing in substance that the treasurer of said city on December 27, 1847, did sell, according to the provisions of the charter and ordinances of said city, in such case made and provided, to Charles W. Hill, lot thirty in the Vistula division of the city of Toledo, Ohio, for the Vistula grade tax charged thereon, which amounted to $99.86, forthwith paid by said purchaser to said city treasurer; that more than two years had elapsed from the date of said sale; and that said premises not having been redeemed, and the certificate of said sale to said Charles W. Hill having been assigned and transferred to said Charles Butler, and having been produced to said city clerk of the city of Toledo, with the endorsement of said city treasurer thereon that no money had been deposited with him for the redemption thereof, that in consideration of the premises and on request of said Charles Butler, said Patrick J. Monahan, clerk of the city of Toledo, granted and assigned to said Charles Butler, his heirs and assigns forever, said above described premises, to have and to hold same to the proper use of said Charles Butler, his heirs and assigns forever.

3. In excluding and rejecting duly certified copy of duly executed and recorded deed from the city clerk of Toledo, Ohio, to Charles Butler, dated March 26, 1860, said deed reciting and evidencing in substance that the treasurer of said city on December 27, 1847, did sell, according to the provisions of the charter and ordinances of said city, in such case made and provided, to Charles M. Dorr, lot thirty-one in the Vistula division of the city of Toledo, Ohio, for the Vistula grade tax charged thereon, which amounted to $79.56,
forthwith paid by said purchaser to said city treasurer,
369 that more than two years had elapsed from the date of said sale; and said premises not having been redeemed, and the certificate of said sale to said Charles M. Dorr, having been assigned and transferred to said Charles Butler, and having been produced to said city clerk of the city of Toledo, with the endorsement of said city treasurer thereon that no money had been deposited with him for the redemption thereof, that, in consideration of the premises

and on request of said Charles Butler, said Patrick J. Monahan, clerk of the city of Toledo, granted and assigned to said Charles Butler, his heirs and assigns forever, said above described premises, to have and to hold same to the proper use of said Charles Butler, his heirs and assigns forever.

4. In excluding and rejecting duly certified copy of duly executed and recorded deed from the city clerk of Toledo, Ohio, to Charles Butler, dated March 26, 1860, said deed reciting and evidencing in substance that the treasurer of said city on December 27, 1847, did sell, according to the provisions of the charter and ordinances of said city, in such case made and provided to Charles M. Dorr, lot thirty-two in the Vistula dvision of the city of Toledo, Ohio, for the Vistula grade tax charged thereon, which amounted to $76.56, forthwith paid by said purchaser to said city treasurer; that more than two years had elapsed from the date of said sale; and said premises not having been redeemed, and the certificate of said sale to said Charles M. Dorr, having been assigned and transferred to said Charles Butler, and having been produced to said city clerk of the city of Toledo, with the endorsement of said city treasurer thereon that no money had been deposited with him for the redemption thereof, that, in consideration of the premises and on request of said Charles Butler, said Patrick J. Monahan, clerk of the city of Toledo, granted and assigned to said Charles Butler, his heirs and assigns forever, said above described premises, to have and to hold same to the proper use of said Charles Butler, his heirs and assigns forever.

5. In excluding and rejecting duly certified copy of duly executed and recorded deed from the city clerk of Toledo, Ohio, to Charles Butler, dated March 26, 1860, said deed reciting and evidencing in substance that the treasurer of said city on December 27, 1847, did sell, according to the provisions of the charter and ordinances of said city, in such case made and provided to Charles M. Dorr, lot thirty-three in the Vistula division of the city of Toledo, Orio, for the Vistula grade tax charged thereon, which amounted to
$76.56, forthwith paid by said purchaser to said city
370 treasurer; that more than two years had elapsed from the
date of said sale; and said premises not having been redeemed, and the certificate of said sale to said Charles M. Dorr having been assigned and transferred to said Charles Butler, and having been produced to said city clerk of the city of Toledo, with the endorsement of said city treasurer thereon that no money had been deposited with him for the redemption thereof, that, in consideration of the premises and on request of said Charles Butler said Patrick J. Monahan, clerk of the city of Toledo, granted and assigned to said Charles Butler, his heirs and assigns forever, said above described premises, to have and to hold same to the proper use of said Charles Butler, his heirs and assigns forever.

6. In excluding and rejecting duly certified copy of duly executed and recorded deed from the city clerk of Toledo, Ohio, to Charles Butler, dated March 26, 1860, said deed reciting and evidencing in substance that the treasurer of said city on December

27, 1847, did sell, according to the provisions of the charter and ordinances of said city, in such case, made and provided, to Charles M. Dorr, lot 1008 in the Vistula division of the city of Toledo, Ohio, for the Vistula grade tax charged thereon, which amounted to $166.42, forthwith paid by said purchaser to said city treasurer; that more than two years had elapsed from the date of said sale; and said premises not having been redeemed, and the certificate of said sale to said Charles M. Dorr, having been assigned and transferred to said Charles Butler, and having been produced to said city clerk of the city of Toledo, with the endorsement of said city treasurer thereon, that no money had been deposited with him for the redemption thereof, that in consideration of the premises and on request of said Charles Butler, said Patrick J. Monahan, clerk of the city of Toledo, granted and assigned to said Charles Butler, his heir and assigns forever, said above described premises, to have and to hold same to the proper use of said Charles Butler, his heirs and assigns forever.

7. In excluding and rejecting duly certified copy of duly executed and recorded deed from the city clerk of Toledo, Ohio, to Charles Butler, dated March 26, 1860, said deed reciting and evidencing in substance that the treasurer of said city on December 27, 1847, did sell, according to the provisions of the charter and ordinances of said city, in such case made and provided, to Charles M. Dorr, lot 1,009 in the Vistula division of the city of Toledo, Ohio, for the Vistula grade tax charged thereon, which amounted to $199.70,

371 forthwith paid by said purchaser to said city treasurer; that more than two years had elapsed from the date of said sale; and said premises not having been redeemed, and the certificates of said sale to said Charles M. Dorr having been assigned and transferred to said Charles Butler, and having been produced to said city clerk of the city of Toledo, with the endorsement of said city treasurer thereon that no money had been deposited with him for the redemption thereof, that in consideration of the premises and on request of said Charles Butler, said Patrick J. Monahan, clerk of the city of Toledo, granted and assigned to said Charles Butler his heirs and assigns forever, said premises, so assigned as aforesaid, to have and to hold same to the proper use of said Charles Butler, his heirs and assigns forever.

8. In excluding and rejecting duly certified copy of duly executed and recorded deed from the city clerk of Toledo, Ohio, to Charles Butler, dated March, 26, 1860, said deed reciting and evidencing in substance that the treasurer of said city on December 27, 1847, did sell, according to the provisions of the charter and ordinances of said city, in such case made and provided, to T. H. Hough, lot 1,008½ in the Vistula division of the city of Toledo, Ohio, being all that piece of land or lot lying between lot 20 and lot 1,008 in said Vistula division, being 21 feet front on Lynn street, running easterly 82½ feet from Lynn street, for the special grade tax charges thereon, which amounted to $46.60, forthwith paid by said purchaser to said city treasurer; that more than two years had elapsed from the date of said sale; and said premises not

having been redeemed, and the certificate of said sale to said T. H. Hough having been assigned and transferred to said Charles Butler, and having been produced to said city clerk of the city of Toledo, with the endorsement of said city treasurer thereon that no money had been deposited with him for the redemption thereof, that, in consideration of the premises and on request of said Charles Butler, said Patrick J. Monahan, clerk of the city of Toledo, granted and assigned to said Charles Butler, his heirs and assigns forever, said above described premises, to have and to hold same to the proper use of said Charles Butler, his heirs and assigns forever.

V. The court erred in the admission of evidence offered by the plaintiff in rebuttal in the following instances, to-wit:

1. In receiving in evidence a certain letter from Charles Butler to Walter Goodman, dated at New York March 2, 1860, the substance thereof being that Mr. Bronson, who was negotiating with Charles Butler for the Toledo property, had come to New York and wanted to negotiate for the entire block instead of part of
372 it; that the bargain being concluded for the whole block at $17,500.00, that Bronson did not agree to pay any money until Butler was prepared to give him a good deed, with certificate of title; that Butler enclosed a copy of the agreement between him and Bronson, that Goodman might understand perfectly the great importance to Butler of having the deed then lying in the Manhattan bank in escrow delivered to Butler in order that he might make a proper deed of warranty to Mr. Bronson as early as practicable and avoid possible excuse for his backing out; that Butler also handed Goodman copy of account as finally settled October 1, 1854, by Goodman and Mr. Anderson, and which said parties and Butler had before them October 1, 1855, when Goodman and Anderson were at New York, and at which date they executed the deed and lodged it in escrow with W. C. Halstead of the Manhattan bank, to be delivered to Butler on the order of either of them;

That since then the only payment made was of $1,000.00 to Peter Anderson January 1, 1857, of which Goodman has a statement, and for which Butler holds paid draft; that by the terms of agreement made in 1852, with James, after he became of age, Butler was to pay six per cent. interest; that in the fall of 1855, when final adjustment was had in New York, Butler agreed to pay seven per cent. after that date and so computed the amount, making $9,183.88 on January 1st, last; that if Goodman would give Butler an order on Mr. Halstead for the deed, Butler would lodge with him a stipulation to pay over the money to be received from Mr. Bronson on May 1st (the $2,000.00 and interest thereon from December 26th, last), and would also place with him the bond and mortgage or notes and mortgage which he was to take from Mr. Bronson for $15,000.00, duly assigned by Butler to James H. Anderson as collateral security for the payment of the balance due from Butler; that Butler wanted to place the papers at the earliest date practicable in the hands of the lawyer, M. R. Waite, Esq., of Toledo, whose certificate of title Butler was bound to furnish to

Mr. Bronson; that there was to be no transfer of title until the whole thing is consummated.

2. In receiving in evidence a certain letter from Charles Butler to Walter Goodman dated in New York February 25, 1860, the substance thereof being that said Butler enclosed in said letter copy of a letter to James H. Anderson relative to sale of Butler's Toledo property, accomplished after a great deal of negotiation, to responsible purchaser, who intended to proceed immediately on
373 obtaining his title to improve the property and to erect extensive buildings; and that said purchaser held Butler's contract to make a good title on or before May 1st, when he was to pay $2,000.00 and interest, another payment to be made July 20, of $465.00 and on January 20th following, $2,465, Butler to take purchaser's bond and mortgage for balance of $15,500.00 on the 1st of May, which bond and mortgage Butler stated he would assign and deposit with C. O. Halstead in Manhattan bank; that the deed to Butler was in Mr. Halstead's hands in escrow, deposited by Walter Goodman some years ago; that Butler would have to have this delivered to him to enable him to make warranty deed to Mr. Bronson, and requesting co-operation to enable Butler to promptly close with Bronson; that Bronson would pay the money as soon as he could get the title on receiving fifteen days' notice; that Butler would despair of finding another purchaser at so good a price in ten years again, if this should fail him; that the amount of principal and interest due from him is a little over $9,000.00, that the amount of said sale was $17,500.00; that the cash payment would be immediately paid James and the bond and mortgage assigned, requesting prompt action and desiring to place the papers in the hands of Butler's counsel, M. R. Waite, Esq., to be delivered and put on record simultaneously with the payment of the $2,000.00 and the execution and delivery of the bond and mortgage by Mr. Bronson.

3. In receiving in evidence a certain contract between Henry Anderson and Charles Butler, dated October 4, 1844, the substance thereof being the following recitals:

That Butler had assigned the Bissell bond and mortgage to Anderson as collateral security for the payment of $20,000.00 note theretofore given by Butler to Anderson;

That proceedings in relation to the Bissell bond had been taken by Anderson, and that an order for sale of the mortgaged premises had been made and confirmed;

That a decree or judgment for deficiency might be obtained in favor of Anderson against Bissell;

That Butler as further collateral security for the payment of his $20,000.00 note in favor of Anderson, had also assigned to Anderson certain shares of railroad stock of the par value of $27,300.00;

That Anderson, at the request of Butler and in consideration of the covenant of Butler in said agreement contained, was willing to relinquish and surrender to Butler the collateral securities so assigned as aforesaid for the payment of said note of $20,
374 000.00, so far as same might be done without prejudice or injury to the order obtained for sale of said premises and the

rights of Anderson under the same, and without prejudice to the personal liability of Butler to Anderson on the principal debt.

Said contract further providing in substance as follows:

In consideration of the premises and for the purpose of giving effect to the same, Anderson has at this date executed and delivered a power of attorney to Butler, authorizing him if he sees fit to do so, to release and discharge Bissell from all personal claims on said bond and mortgage, but without prejudice to the proceedings which have been or may be adopted to effect the sale of said mortgaged premises; and that Anderson has also, in writing, released and transferred to Butler the shares of railroad stock.

Butler, in consideration of the surrender and relinquishment of said securities, covenants and agrees with Anderson that the same shall not be held or construed in any way to affect or impair the liability of Butler on said note for $20,000.00; and Butler also covenants and agrees with Anderson that he, Butler, will apply and pay over to Anderson on account of said note any money or other consideration which he, Butler, may receive or derive by reason of the surrender and relinquishment of the securities aforesaid by Anderson.

4. In receiving in evidence sections 1, 2 and 6 of stipulations 2 herein and Exhibit "A" thereof, the substance of said sections and said exhibit, respectively, being as follows:

SEC. 1. That Charles Butler, under whom defendant claims title to the premises made the subject of this action, died at his home in New York city, December 13, 1897; that the instruments, etc., described in said Exhibit A were shortly after the death of said Charles Butler found with his papers, and thereupon passed into the custody of Miss Emily O. Butler, the surviving child and sole heir at law of said Charles Butler, deceased, and have since been delivered to Mr. Oliver B. Snider, attorney at law, at Toledo, Ohio, as custodian thereof, for proper use by the parties to this suit, the genuineness and authenticity and notice to produce all of said instruments being dispensed with, but without waiving objections thereto.

SEC. 2. That until the final determination of this suit, said instruments are to remain in the custody of said Mr. Oliver B. Snider, and that copies thereof received in evidence may be substituted for the originals for making up the record herein.

375 SEC. 6. That at the time the executors and trustees of the will of Henry Anderson turned over to James H. Anderson, in settlement of their trust, the property and effects coming to him under said will which took place some time before May 1, 1860, the note referred to in said stipulation, had not been fully paid or extinguished; and that if any payments were thereafter made and intended as credits upon said note, the same were made to James H. Anderson.

Exhibit A, is a list of written instruments, etc., delivered to Oliver B. Snider, Esq., under said stipulation, June 1, 1905, including envelope containing:

Receipts of Walter Goodman, executor, and Peter Anderson, executor;

Statement of account dated September 27, 1852;
Original note for $7,340.10 dated October 1, 1853;
Draft for $2,172.70, drawn by James H. Anderson, at Memphis, Tenn., March 8, 1861, on Charles Butler, No. 12 Wall street, New York, and stamped, "Received payment. American Exchange Bank."

5. In receiving in evidence section 3 of the stipulation No. 3 herein, the substance thereof being that on May 7, 1860, Charles Butler wrote a letter to Walter Goodman, executor, stating that he was indebted to the estate of Henry Anderson, May 1, 1860, in the sum of $9,360.97.

6. In receiving in evidence stipulation No. 4 herein, the substance thereof relating to the correspondence between Charles Butler and Henry Anderson, Walter Goodman, Peter Anderson and James H. Anderson, or any of them, and the Manhattan Bank of New York City, and the authenticity of letters found and the search for and failure to find others, etc., and certain provisions with respect to the use in evidence of those found.

7. In receiving in evidence a certain letter dated at New York, March 19, 1860, from Charles Butler to Walter Goodman, the substance thereof being that Butler had just been to the Manhattan Bank to see if he could find deed of the Toledo property deposited there by Goodman October 9, 1855, and found it all safe; that it was left with Mr. Allaire, the first teller that the envelope had the endorsement, "The property of Walter Goodman, Peter Anderson, and to be delivered on the order of either of them." Further that Butler's contract with Bronson for sale of the property was very stringent and required Butler to make title to the property with certificate of Mr. Waite that the title is clear and free and valid, and to have the deed with the certificate of title at Toledo by the first of May; that Butler was apprehensive Bronson might back
376 out, and that prompt attention was important; that on the record, the title was in Henry Anderson; that the deed of the executors and trustees of Henry Anderson to Butler and Butler's warranty deed to Bronson made a perfect chain going back more than twenty-two years; that possession had been held during all that time by Butler, and that the taxes had been paid by him; that Butler desired Goodman's order on Mr. C. O. Halstead, president of the Manhattan Bank, for delivery of the package containing the deed to him, and requested Goodman to direct Halstead to open package and hand deed itself to Butler and take from him a receipt for deed and Butler's stipulation to return in place of it the cash payment of $2,000.00 to be paid by Bronson on delivery of deed, and also to deliver bond and mortgage of Bronson for $15,500.00 for the balance of purchase, and urging the importance of prompt attention.

8. In receiving in evidence Exhibit D of the stipulation No. 1 herein, same being a certain unrecorded contract between Charles Butler and William Anderson dated October 10, 1849, providing in substance that Henry Anderson, held the title to the premises in controversy in this suit, acquired through foreclosure proceedings

by deed from Edson Allen, master commissioner, in trust to secure an indebtedness evidenced by note of Charles Butler to Henry Anderson dated in July, 1841, for $20,000.00 and interest, said William Anderson declaring that his interest in said premises as heir at law of said Henry Anderson, deceased, was held in trust as security for the payment of said note and for no other purpose whatever, and agreeing on the payment thereof to execute and deliver to said Charles Butler, his heirs or assigns, a full and complete release of his title in and to all or any part of said premises, said Butler agreeing on his part to pay said note to the executors of Henry Anderson, with interest as follows:

October 10, 1849, $3,762.52, with all interest then due;
October 1, 1850, $1,500.00, with all interest then due;
October 1, 1851, $2,000.00, with all interest then due;
October 1, 1852, $2,500.00, with all interest then due;
October 1, 1853, $4,000.00, with all interest then due;
October 1, 1854, $4,000.00, with all interest then due;
October 1, 1855, $6,000.00, with all interest then due;

That Butler would also pay all taxes and assessments on said premises; and that the amount found due to Charles Butler from the estate of Henry Anderson, deceased, under contract for com-
377 missions for warranting title to lands sold for the American Land Company should be applied toward the payment of said note.

9. In receiving in evidence Exhibit D2 of stipulation No. 1 herein, same being a certain unrecorded contract between Charles Butler and James H. Anderson, dated September 16, 1851, and supplement thereto, said principal contract providing in substance that Henry Anderson held the title to the premises in controversy in this suit, acquired by foreclosure proceedings had in the Common Pleas Court of Lucas county, Ohio, in trust as security for the payment of note given by said Butler to Henry Anderson, dated July 1, 1841, for $20,000.00, said James H. Anderson declaring that his interest in said premises as heir at law of said Henry Anderson, deceased, was held in trust to secure the payment of said note; that since the death of Henry Anderson, said Butler had made several payments of large sums of money on account of said debt to the estate of Henry Anderson; that said James H. Anderson, the only child and heir of said Henry Anderson was willing and desirous to execute a declaration, in writing, explanatory and declaratory of said facts in respect to said property, and to carry into effect the intention of his father, to the end that justice might be done and by said instrument acknowledged and declared that said premises and every part thereof, had been and were held as security for the payment of the balance due or to become due on said note from said Charles Butler, and for no other purpose or interest whatever; and that on the payment of said note and interest, said premises should and would be duly released and conveyed to Charles Butler, his heirs or assigns; and the said James H. Anderson did further by said agreement stipulate and covenant

with said Butler, his heirs and assigns, that upon the request of said Butler, or his heirs and assigns, he would execute, acknowledge and deliver any other or further assurance in the premises, so that the lots of land aforesaid should be held subject to the payment of the principal and interest of the aforesaid debt, and for no other purpose; said supplement to said principal contract dated October 1, 1852, further providing that in consideration of the payment of said note of said Charles Butler to the executors of said Henry Anderson, as agreed in said principal contract, the time for the payment thereof was thereby extended as follows:

October 1, 1852, $2,500.00;
October 1, 1853, $4,000.00;
October 1, 1854, $4,000.00;
378 October 1, 1855, $4,000.00;
October 1, 1856, the balance;

And that interest at six per cent. on the whole sum should be paid annually on October 1, in each year, and that said agreement should be taken in connection with and supplemental to said principal contract dated September 16, 1851.

10. In receiving in evidence a certain letter dated at New York, July 28, 1858, from Charles Butler to J. H. Anderson, the substance thereof being statement that the only possible means Butler could command for the payment of the balance due James H. Anderson was in the property at Toledo, and that the object of his going to Toledo was to see if he could make any disposition of the whole or portions thereof for that purpose then or in a short time, and that he had been negotiating with a party for the sale of one-fourth part of the mortgaged property, and hoped to effect sale, that there was about $2,000.00 of taxes and assessments against the property overdue since the fall preceding, which Butler was unable to provide for; that he was financially embarrassed and could not then promise to make cash payments to Anderson and offered to turn over the property at a bona fide valuation in payment, and at a liberal deduction; that Butler had struggled to hold onto this property for many years in the hope of realizing some part of the large sum it had cost him, and that for the first time in many years it then looked to him as though it would be in demand at prices that would pay off the encumbrance and yield a handsome surplus; that some years ago, Butler agreed with the Bethel Seamen's Church Society to give them a lot out of this property for a church erection, that a hand-some brick edifice had been erected and was now occupied, and they were entitled to a deed therefor; and that the erection of the church had added value to the property and relieved from some burden of taxes.

11. In receiving in evidence the testimony of Oliver B. Snider, Esq., the substance thereof being that he had appeared in this litigation as attorney for Miss Emily O. Butler, associated with the attorneys for the defendant, Rosewell E. Messenger, under employment from Miss Butler, the sole heir at law of Charles Butler, deceased, and as far as he could to watch her interest, said interest being a contingent liability.

V. The court erred in granting the plaintiff leave, and in permitting the plaintiff to file an amendment to the petition herein, to make same conform to the proofs on the subject of damages for rents and profits accrued up to the time of the beginning
379 of the suit.

VI. And said defendant, in the above entitled cause, further assigns errors in the trial and decision of said Circuit Court in said cause as follows:

1. Said court erred in sustaining the motion made by counsel for said plaintiff, Peter Anderson, that the court should direct the jury to return a verdict in favor of said plaintiff, Peter Anderson, made upon the conclusion of the introduction of all the testimony introduced upon the trial of said cause.

2. Said court erred in charging and directing the jury to return a verdict for the plaintiff.

3. Said court erred in not submitting to the jury for determination the issues joined in said cause between said parties thereto, together with the evidence thereon, offered and received by said court upon the trial of said cause.

VII. Said court erred in denying and overruling defendant's motion duly filed herein November 30, 1908, at the June, 1908, term of said court, for an order vacating and setting aside the order entered herein by this court under date of September 15, 1908, denying and overruling defendant's motion to vacate and set aside the judgment entered herein in favor of plaintiff June 2, 1908, at the present term of this court, and for an order vacating and setting aside said judgment in favor of plaintiff and granting defendant a new trial herein.

Wherefore, the said Rosewell E. Messenger, defendant in said Circuit Court, and plaintiff in error in the Circuit Court of Appeals, prays that the judgment of said Circuit Court of the United States for the Northern District of Ohio, Western Division, in said cause, be reversed, and that said Circuit Court be directed to grant a new trial of said cause.

O. B. SNIDER,
C. W. EVERETT,
KING, TRACY, CHAPMAN & WELLES,
Attorneys for said Defendant, Rosewell E. Messenger.

(Endorsement:) No. 1897. United States Circuit Court, Northern District of Ohio, Western Division. Peter Anderson vs. Rosewell E. Messinger. Assignment of Errors. Filed, November 30, 1908. Irvin Belford, Clerk, United States Circuit Court, Northern District of Ohio. King, Tracy, Chapman & Welles, Attorneys.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

No. 1897. At Law.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

380 *Petition for Writ of Error.*

And now comes Rosewell E. Messenger, the defendant herein, and says that on or about the 2nd day of June, 1908, this court entered judgment herein in favor of the plaintiff, Peter Anderson, and against this defendant, Rosewell E. Messenger, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

By O. B. SNIDER,
C. W. EVERETT,
KING, TRACY, CHAPMAN & WELLES.
Attorneys for Defendant, Rosewell E. Messenger.

(Endorsement:) No. 1879. United States Circuit Court, Northern District of Ohio, Western Division. At law. Peter Anderson vs. Rosewell E. Messenger. Petition for writ of error. Filed November 30, 1908. Irvin Belford, Clerk, United States Circuit Court, Northern District of Ohio. King, Tracy, Chapman & Welles, Attorneys.

June Term, A. D. 1908, to-wit, November 30, 1908.

Present the Honorable Robert W. Tayler, United States District Judge.

No. 1897. At Law.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Order Allowing Writ of Error.

This 30th day of November, 1908, came the defendant, Rosewell E. Messenger, by his attorneys, and filed herein and presented to

the court his petition, praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying, also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the defendant giving bond, according to law, in the sum of two thousand dollars ($2,000.00), which shall operate as a supersedeas bond.

381 And thereupon came the defendant and presented bond in said sum, in due form of law, which bond is now filed herein and hereby duly approved by the court.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

At Law. No. 1897.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, Rosewell E. Messenger and Isabel M. Barber and Aletta W. Burgert, as sureties, are held and firmly bound unto Peter Anderson, defendant in error, and plaintiff in the suit herein-below mentioned, in the full and just sum of two thousand and no-100 dollars ($2,000.00), to be paid to the said plaintiff, Peter Anderson, his certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of November, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a Circuit Court of the United States for the Northern District of Ohio, Western Division, in a suit depending in said court, between said Peter Anderson, as plaintiff, and said Rosewell E. Messenger, as defendant therein, respectively, and known as No. 1897 in said court, a judgment was rendered against the said Rosewell E. Messenger and in favor of said Peter Anderson, and the said Rosewell E. Messenger having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Peter Anderson, defendant in error as aforesaid, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden

at the city of Cincinnati, in said circuit, on the 30th day of December next.

Now, the condition of the above obligation is such, that if the said Rosewell E. Messenger shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make said plea good, then the above obligation to be void, else to remain in full force and virtue.

ROSEWELL E. MESSENGER. [SEAL.]
ISABEL M. BARBER. [SEAL.]
ALETTA W. BURGERT. [SEAL.]

Sealed and delivered in presence of

LILLIAN DENTON,
382 WILEY P. TIBBITS.
As to R. E. M. & I. B.
LILLIAN DENTON.
MADELINE BARBER.
As to A. W. B.

Approved by:
R. W. TAYLER, *Judge.*

(Endorsement:) No. 1897. United States Circuit Court, Northern District of Ohio, Western Division. Peter Anderson vs. R. E. Messenger. Bond on writ of error. Filed November 30, 1908. Irvin Belford, Clerk, United States Circuit Court, Northern District of Ohio. King, Tracy, Chapman & Wells, Attorneys.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Northern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Peter Anderson, plaintiff, and Rosewell E. Messinger, defendant, being cause No. 1897 in said Court, a manifest error hath happened, to the great damage of the said Rosewell E. Messinger, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the* 30th day of December next, in the said circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may

cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of November, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America the one hundred and thirty-third.

[SEAL.] IRVIN BELFORD,
Clerk of the Circuit Court of the United States for the Northern District of Ohio.

Allowed by
R. W. TAYLER, *J.*

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*Not exceeding thirty days from the day of signing the citation.

Filed November 30, 1908. Irvin Belford, Clerk United States Circuit Court, Northern District Ohio.

38.) THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Northern District of Ohio, ss:

In pursuance of the command of the writ of error within, I, Irvin Belford, clerk of the Circuit Court of the United States for the Northern District of Ohio, herewith transmit a true copy of so much of the record, bill of exceptions, assignment of errors, and proceedings in this case of Peter Anderson vs. Rosewell E. Messinger, as I am advised by counsel as shown by stipulation of counsel and the praecipe for transcript, attached to said transcript, are necessary to the hearing in the Circuit Court of Appeals, lately pending in the Circuit Court of the United States for the Northern District of Ohio, under my hand and seal of said court.

Witness my official signature and the seal of said Circuit Court, at the city of Toledo, in said district, this 28th day of December, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America the one hundred and thirty-third.

[SEAL.] IRVIN BELORD,
Clerk of the Circuit Court of the United States for the Northern District of Ohio.
By J. W. WILSON,
Deputy Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To Peter Anderson, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said Circuit, on the

30th day of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Northern District of Ohio, wherein Rosewell E. Messinger is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 30th day of November, in the year of our
384 Lord one thousand nine hundred and eight, and of the Independence of the United States of America the one hundred and thirty-third.

R. W. TAYLER, *Judge*.

We hereby acknowledge due personal service of the above citation on behalf of Peter Anderson, defendant in error herein.

PETER ANDERSON,
By R. P. CARY,
C. A. THATCHER AND
C. H. TRIMBLE,
His Attorneys.

November 30, 1908.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

PETER ANDERSON, Plaintiff,
vs.
ROSEWELL E. MESSENGER, Defendant.

Praecipe.

To the Clerk of said Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Sixth Circuit, pursuant to writ of error allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

1. Petition.
2. Order granting leave to file amended and supplemental answer.
3. Amended and supplemental answer.
4. Reply to amended and supplemental answer.
5. Motion to strike from reply.
6. Motion for leave to file supplement to third defense of amended and supplemental answer.
7. Supplement to third defense of amended and supplemental answer.
8. Order denying motion to strike from reply.
9. Motion to stay proceedings.
10. Reply, filed June 2, 1908.
11. Amendment to petition.

12. Preliminary orders and judgment on verdict.
13. Motion for new trial.
14. Motion to stay proceedings, filed June 10, 1908.
15. Order on motion to stay.
16. Orders and judgment of September 15, 1908.
17. Stipulation as to not recording exhibits filed September 15, 1908.
18. Bill of exceptions from and including statement of counsel for defendant, showing submission thereof to them, to and including page 413, where signed by Hon. R. W. Tayler, Judge.
385 19. Order allowing bill of exceptions.
20. Order granting leave to file motion.
21. Motion filed November 30, 1908.
22. Order overruling said motion and allowing bill of exceptions.
23. Bill of exceptions filed November 30, 1908.
24. Order of remittitur entered November 30, 1908.
25. Findings and orders upon application for benefit of statute relative to occupying claimants, entered November 30, 1908.
26. Assignment of errors, filed November 30, 1908.
27. Petition for writ of error.
28. Order allowing same.
29. Bond on writ of error, and approval thereof.
30. Writ of error.
31. Citation.

Respectfully,

C. W. EVERETT,
O. B. SNIDER, AND
KING, TRACY, CHAPMAN & WELLES,
Attorneys for Rosewell E. Messenger, Defendant Herein and Plaintiff in Error.

Receipt of copy of the foregoing praecipe is hereby acknowledged.

PETER ANDERSON,
By C. A. THATCHER,
One of His Attorneys.

Toledo, O., December 24, 1908.

(Endorsement:) In the Circuit Court of the United States, for the Northern District of Ohio, Western Division. Peter Anderson, plaintiff, vs. Rosewell E. Messenger, defendant. Praecipe. Filed December 24, 1908. Irvin Belford, Clerk United States Circuit Court, Northern District Ohio. King, Tracy, Chapman & Welles, Attorneys.

Circuit Court of the United States, Northern District of Ohio, Western Division.

No. 1897. Law.

PETER ANDERSON
vs.
ROSEWELL E. MESSENGER.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Irvin Belford, Clerk of the Circuit Court of the United States for said District, do hereby certify that the annexed and foregoing pages contain a full and true transcript and copy of the record, bills of exceptions, assignment of errors, papers, exhibits and proceedings in the above entitled case necessary to the hearing in the Circuit Court of Appeals, as provided by stipulation of counsel, ap-
386 pearing at page 69 hereof, and as shown by the attached praecipe for transcript filed by counsel for defendant, appearing at page 541 hereof; and there is annexed to and transmitted therewith the writ of error and citation issued therein.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said Court at Toledo, in said District, on this 28th day of December, A. D., 1908, and of the 133rd year of the Independence of the United States of America.

IRVIN BELFORD, *Clerk.*
[SEAL.] By J. W. WILSON,
Deputy Clerk.

387 And afterwards towit on December 29 1908 praecipe for appearance of counsel was filed which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1916.

ROSEWELL E. MESSINGER
vs.
PETER ANDERSON.

Frank O. Loveland, Clerk of said Court:

Please enter *my* appearance as counsel for the plaintiff in error.

O. B. SNIDER.
C. W. EVERETT.
KING, TRACY, CHAPMAN & WELLES.

Dec. 29, 1908.

And afterwards towit on May 4, 1909, an entry was made upon the Journal of said Court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

ROSEWELL E. MESSINGER
vs.
PETER ANDERSON.

Before Lurton, Severens and Warrington, C. J. J.

388 This cause is argued in part by Mr. Clayton W. Everett for the plaintiff in error and by Mr. Rhea P. Cary for the defendant in error and is continued until tomorrow for further argument.

And afterwards towit on May 5, 1909, an entry was made upon the Journal of said Court in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

ROSEWELL E. MESSINGER
vs.
PETER ANDERSON.

Before Lurton and Severens, C. J. J. and Knappen, D. J.

At the opening of Court Judge Warrington stated that for personal reasons he felt that he ought not to sit in this case and thereupon withdrew and Judge Knappen took his place as a member of the Court and the argument was begun anew. Mr. Clayton W. Everett again argued on behalf of the plaintiff in error; Mr. Rhea P. Cary and Mr. C. H. Trimble for the defendant in error and Mr. O. B. Snider and Mr. Harry E. King for the plaintiff in error, and the cause is submitted to the Court.

And afterwards towit on June 8, 1909 judgment was entered in said cause clothed in the words and figures as follows:

389 United States Circuit Court of Appeals for the Sixth Circuit.

No. 1916.

ROSEWELL E. MESSINGER
vs.
PETER ANDERSON.

Error to the Circuit Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Ohio and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in said cause be and the same is hereby affirmed with costs.

And afterwards towit on June 17 1909 an opinion was filed clothed in the words and figures as follows:

Opinion.

390 United States Circuit Court of Appeals, Sixth Circuit.

No. 1916.

ROSEWELL E. MESSINGER, Plaintiff in Error.
v.
PETER ANDERSON, Defendant in Error.

Submitted May 5, 1909. Decided June 8, 1909.

Before Lurton and Severens, Circuit Judges and Knappen, District Judge.

LURTON, Circuit Judge, delivered the opinion of the court.

This is the third writ of error in the same case. The action was ejectment to recover real estate. The plaintiff below was Peter Anderson, a grandson of Henry Anderson, and the title turned upon the proper interpretation of the will of Henry Anderson.

Upon the first trial of the case the court below ruled that under that will the plaintiff took no title, and directed a judgment for the defendant. Upon the first writ of error we adjudged that the court below had erroneously construed the will of said Anderson, and that upon a proper interpretation thereof the plaintiff took title to the premises involved. The judgment was accordingly reversed and remanded for a new trial. The opinion of this court was by Severens, circuit judge, and is reported in 146 Federal, 929.

391 Upon a second trial the court again instructed a verdict for the defendant. This instruction was, however, not based upon the former erroneous interpretation of the will under which plaintiff claimed, but upon the ground that the plaintiff's action was barred by a peculiar statute of limitations operating as a forfeiture of an estate in remainder or reversion, in favor of the person next entitled, for a neglect to pay taxes.

Upon a second writ of error the judgment was reversed and a new trial awarded. The opinion of this court by Severens, circuit judge, fully states the ground upon which the court proceeded; 158 Federal, 250, 254.

Upon the third trial in the court below, the defendant interposed a plea in bar to this action arising out of three judgments of the Ohio court of common pleas for Lucas county, in each of which there had been a judgment adverse to the identical title here set

up under the will of Peter Anderson. In the first of these cases, Peter Anderson was sole plaintiff, and the United Realty Company and Rosewell E. Messinger, defendants, the first mentioned claiming under Messinger. In the other two cases the United States Mortgage and Trust Company was plaintiff and Rosewell E. Messinger and Peter Anderson, defendants. In each case there was involved the title of Peter Anderson under the will of Henry Anderson, and in each action the Ohio court of common pleas adjudged that he took no interest or title under said will, and in each action the judgment, upon that ground, was adverse to Peter Anderson. The last two suits were started while the present suit was pending. They were petitions to foreclose mortgages made by Messinger upon each of the lots and parts of lots involved in this action, except lot No. 33. The judgments of foreclosure in these cases were appealed from by Anderson, and the appeals were pending in the supreme court of Ohio when this cause was heard in the court below. Unless there is something exceptional in the statute of Ohio providing for appeals in equity cases, it is obvious that the judgments and decrees in these cases are lacking in that finality essential to support a plea of res adjudicata. We need not stop to look into this matter, because, for the purposes of this case, it is enough to determine the legal
392 effect of the judgment in Anderson v. United Realty Company and Messinger as a bar to this suit. If that was effectual, we must reverse the judgment. If it was not, the foreclosure decrees would not be, for the same reason, without going further. Recurring, then, to the judgment in Anderson v. Messinger, which was relied upon in bar of the suit below.

It has been insisted that that action included some of the lots involved in this case, and that whatever the effect of the judgment in that case as a bar to other property, it is an absolute bar so far as that action sought to recover the identical property sued for in this. This point has no other footing than the fact that the original petition did include part of lot No. 19, and the whole of lot No. 21, which are included among those sued for in this action. But in an amended reply to the answer of the defendants, Anderson averred that the lots mentioned had been included by clerical mistake—suit for them having been brought in the case then pending in the circuit court of the United States, and concluded by saying, "that he, therefore, withdrew from this proceeding all questions involved as to the title or ownership of said above-named lots."

In the face of this amendment of the pleadings, there could have been no recovery of any part of either lot No. 19 or lot No. 21, for this was a distinct disavowal of any suit for them. The two suits, therefore, were for different parcels of land, the title of the plaintiff in each case being under the same will.

The action now under review was begun December 27, 1904. In June, 1905, there was a directed verdict and judgment for the defendant, from which a writ of error was sued out from this court. Pending that writ, the same plaintiff brought another suit in the Lucas court of common pleas. On March 31, 1906, there was a verdict and judgment for the defendants in this second suit. In

the meantime, the writ of error to this court had been argued and submitted, but the opinion of this court was not filed until June 5, 1906, a period of about two months after the decision by the common pleas court. The result in this court was that the judgment of the circuit court was reversed and remanded for a
393 new trial, upon the ground that the plaintiff, Peter Anderson, took an estate in remainder upon the death of his father, James H. Anderson, under the will of his grandfather, Henry Anderson.

In December, 1906, a second trial of the case was accordingly had in the circuit court, resulting in a second verdict and judgment for the defendant. Although the action in the state court had been decided adversely to the title of Anderson, it was not plead as a bar nor offered in evidence for any purpose upon this second trial in the court below. Upon a second writ of error, the judgment of the circuit court was again reversed and the cause remanded for a third trial. It was upon this third trial that the defendant for the first time sought to interpose this state court judgment as an estoppel to this action.

It has been pressed upon us that that defense was waived by the failure to plead and rely upon it upon the second trial of this case and counsel have cited the Theological Seminary v. The People, 189 Illinois, 439, 447; 29 Am. & Eng. Ency. (2nd Ed.), 1105.

It is undoubtedly true that if one wishes to preclude all inquiry into the truth of the matter by the bar of a former judgment, he must plead it, or in some way show and rely upon it in evidence. If he does not, but relies upon the merits of the case, he cannot complain that the whole matter is open without regard to the estoppel. Union Bank v. Memphis, 111 Federal, 561; S. P. Rd. Co. v. U. S., 168 U. S., 1; U. S. v. Bliss, 172 U. S., 321. This is so even though the former judgment was by the same court. Jourolman v. Massingill, 86 Tenn., 81. But whether a failure to plead such an estoppel upon one trial when the defense was available should operate to prevent reliance upon it upon a subsequent trial, is a matter of doubt, complicated in this case by the interposition of a second writ of error between the two trials. This question we shall pass by, particularly as the plaintiff below seems to have made no objection upon this ground to the plea and obtained no ruling from the trial court.

It has not escaped attention that the judgment relied upon as a bar to this suit was at the time it was plead pending upon writ of error in the supreme court of Ohio. The distinction between
394 a review by writ of error of a judgment at law and an appeal in equity cases is elementary. The latter, when perfected, uproots the decree and carries the case up for rehearing upon law and facts, while the former is in the nature of a new action to annul the judgment, which remains in force until reversed. Nashville Ry. Co. v. Bunn (not yet reported). Inasmuch as a writ of error did not vacate the former judgment, the weight of opinion seems to be that such a judgment may be received in evidence in support of a plea of res adjudicata: 24 Am. & Eng. Ency., 809 et

seq.; Ransom v. City of Pierre, 101 Federal, 665, 669. There is, however, grave danger of injustice if this be the accepted rule, for if the judgment should be reversed when too late to show the fact, the effect would be to cut off the opposite party from a hearing upon the merits. This difficulty has been met in some jurisdictions by setting aside a judgment which had been influenced by the plea in bar upon the fact of reversal being properly called to the attention of the court having the case under consideration upon writ of error or appeal, or by the court of original jurisdiction, if it had not lost control over the record. Parkhurst v. Burdell, 110 N. Y., 386, 392; Ransom v. City of Pierre, 101 Federal, 665.

Possibly, if the judgment thus influenced had become final, so as to be beyond the control of the court rendering it, relief might be had in equity, as suggested by Judge Thayer in Ransom v. City of Pierre. See, also, Humphrey v. Leggett, 9 Howard, 296, 311.

In the case before us it appears that after the judgment below the supreme court of Ohio affirmed the judgment whose finality is questioned, and that this fact was brought to the attention of the court below upon an application for a new trial. Under such circumstances we shall, for the purpose of this case, assume that this judgment was competent evidence in support of the plea of res adjudicata.

The title of the plaintiff in both actions depended absolutely upon the will of his ancestor, Henry Anderson. Interpreted as he contended, his title was clear and indisputable; construed as the defendant in both actions insisted, he took nothing under that will, and his actions must inevitably fail.

395 That a final interpretation of that will in one suit would control in any subsequent litigation between the same parties or privies, in which the same question, under the same conditions, should arise, if presented seasonably, as a former adjudication, is not disputable. That different parcels of land were involved in the two cases would not be material; for if the parties were the same, and the subsequent case should turn upon the same question decided in the former case, under like conditions, that question could not be relitigated if relied upon as an estoppel. Bank v. Beverly, 1 Howard, 134, 149; New Orleans v. Citizens' Bank, 167 U. S. 371, 396; S. P. Rd. Co. v. United States, 168 U. S., 1, 48; Union Bank v. City of Memphis, 111 Federal, 561.

Thus, in New Orleans v. Citizens' Bank, supra, Mr. Justice White, for the court, said:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

The rule of estoppel relied upon is, therefore well settled. The trouble in this case grows out of the fact that there is an apparent conflict of prior adjudications, each of which was pressed upon the court below as governing the judgment upon the third trial of this

case in that court. The one was the judgment of the Ohio state court in the case of Anderson v. United Realty Company and Messinger, and the other was the judgment and opinion of this court interpreting and construing the will of Henry Anderson under the first writ of error to this court.

The Ohio court held that under the will of Henry Anderson the plaintiff took no interest whatever, and this view has since the trial below been affirmed by the supreme court of Ohio. See, 54 Ohio Law Bulletin, p. —.

This court, in this very case, upon the first writ of error, and before any decision by the supreme court of Ohio, decided that the plaintiff took under that will an estate in remainder in
396 all of the property in controversy (146 Federal, 929). Which view of the will involved was the court below required to accept as the law of the case?

That every question of law or fact which was before this court upon the first writ of error and decided by its opinion, was thereby conclusively settled, both for the court below and for this court upon subsequent writs of error, is not open to serious debate. That matters not decided upon the first writ are open for consideration in the lower court upon a second trial is, of course, true, and many times a new case may be made upon new questions of law or fact, where the mandate does not direct a particular judgment. But so far as questions of fact or law are specifically decided, and the cause remanded for further proceedings, the court below is not at liberty to re-examine any such decided matters, but must proceed in conformity to the mandate as interpreted by the opinion of this court. No other rule is conceivable having regard to the necessity of putting an end to litigation. The cases upon this point are numerous. Among them are: Bissell, &c. Co. v. Goshen Co., 72 Federal, 545; Western Union Tel. Co. v. City of Toledo, 121 Federal, 734; Stoll v. Loving, 120 Federal, 805, all decided by this court; and, Sibbald v. United States, 12 Peters, 488, 492; In re Sanford Tool Company, 160 U. S., 247, 259; Roberts v. Cooper, 20 Howard, 467, 481; Skillern v. May, 6 Cranch, 266.

In Skillern v. May it was discovered after the case had been reversed and remanded for further proceedings that the cause was one not within the jurisdiction of the circuit. But upon a certificate of division of opinion upon the right of the circuit court to dismiss the suit for this reason, the supreme court answered that after the merits of the case had been decided, it was too late for the circuit court to do anything other than carry into execution that decree.

The finality of the decision of this court, so far as it did decide any question, is not affected by the fact that it was a judgment reversing the lower court and directing a new trial. The authorities are numerous. We cite a few only: Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 553; Western Union Tel. Co. v. City of Toledo, 121 Federal, 734; Stoll v. Loving, 120 Federal, 805, 808; Tyler
397 v. Magwire, 17 Wallace, 254, 282, 283; Young v. Frost, 1 Md., 394; Haley v. Kilpatrick, 104 Federal, 647; Orient Ins. Co. v. Leonard, 120 Federal 808; Mathews v. Columbia Bank, 100

Federal, 393; Theological Seminary v. The People, 189 Illinois, 439, 452; Leese v. Clark, 20 Cal., 39, 44.

In the case last cited, Mr. Justice Field, after referring to the finality of the adjudication of the supreme court after it had lost control by issuance of a mandate, said of the effect of a judgment of reversal upon points decided, that, "if, upon the construction of the contract supposed, this court reverses the judgment of the court below, and orders a new trial, the decision is equally conclusive as to the principles which shall govern on the re-trial. It is just as final to that extent as a decision directing a particular judgment to be entered is as to the character of such judgment. The court cannot recall the case and reverse its decision, after the remittitur is issued. It has determined the principles of law which shall govern, and, having thus determined, its jurisdiction in that respect is gone. And, if the new trial is had in accordance with its decision, no error can be alleged in the action of the court below."

Counsel for plaintiffs in error have insisted that a judgment of reversal remanding a case for new trial is not a judgment which can be set up as a bar to another suit on the same case and have cited Aurora City v. West, 7 Wallace, 82, 92, 93. The reporter's headnote is misleading. The case supports no such general proposition. The question, as may be seen from an examination of the statement and opinion, arose upon a demurrer to a rejoinder, setting up merely that a judgment in an inferior state court had been reversed and remanded. The holding was that a rejoinder was not good which merely set up a judgment of reversal and a remander for further proceedings, without any comment as to what the question was which was decided by the superior court.

Undoubtedly a judgment of reversal may leave open many questions upon which an identical verdict may result upon another trial. In Mutual Life Insurance Company v. Hill, cited above, it appeared
398 that upon a former writ of error a judgment in favor of the plaintiff below was reversed upon the ground that the record disclosed "an abandonment of the insurance contract." Upon the second writ of error it was insisted that the only question left open was a submission of this question of abandonment, and that the decision of the supreme court was "an adjudication that the plaintiff had a right to recover unless it was shown that there had been an abandonment of the insurance contract." Referring to this matter, and to its former decision, the court said:

"That decision was based upon the averments of the pleadings, and these pleadings were amended after the judgment was reversed and the case returned to the trial court. Clearly the contention of the plaintiffs is not sustainable. When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by

the appellate court that none of the claims of error are well founded—even though all are not specifically referred to in the opinion—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence, the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case. Here, after one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented, and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the record and have not already been decided are open for consideration."

Upon the second writ of error in this very case, we were urged to reconsider the decision in the first writ of error as to the meaning and effect of Henry Anderson's will, as applicable to the title here in controversy. Judge Severens, for the court, said:

399 "We have been invited by counsel for defendant to reconsider the question of the construction of Henry Anderson's will. We must decline to do this. The questions there decided are matters adjudged and have become the law of the case. When the former writ of error was disposed of the questions of law in the case were settled, and we have now no authority to re-determine them. This is the established doctrine which governs the federal courts and is quite general accepted in other courts. This court has recognized and applied the rule in previous cases." 158 Federal, 250, 252.

We have been again urged to re-examine the question of the interpretation of Henry Anderson's will, upon the theory that the question is one of local law, and that we should, therefore, readjust our views to conform to the construction of that will by the supreme court of Ohio, as announced in its opinion in Anderson v. Messinger since our own interpretation upon the first and second writs of error.

Aside from any effect which the construction of a will by one court may have, when seasonably presented, as an adjudication in another case between the same parties, when the same question is involved, there is no such duty devolving upon a court of the United States to follow a state court in their construction of a will, as they do in the construction of a statute. Lane v. Vick, 3 Howard, 464; Barber v. Pittsburg, etc., Rd., 166 U. S., 83, 99, 100, 103, 104.

In Barber v. Pittsburg Railway, cited above, the case involved the construction of a clause in a will which had been theretofore construed by the supreme court of Pennsylvania in a former action of ejectment for the same land and between the same parties. The former suit was adverse to the plaintiff, but was not conclusive under the law of the state, because under the law of that state a single judgment in ejectment was not a bar to a second action. This second action was brought in the circuit court of the United States. There was a judgment there for the defendants, that court following

the construction of the will by the supreme court of the state. The case was taken to the circuit court of appeals upon a writ of error. The court certified to the supreme court this ques-
400 tion, and another, not necessary to set out: "Is the decision of the supreme court of Pennsylvania, before referred to, conclusive?" In reference to this question, the supreme court said:

"The question, whether the opinion of the supreme court of the state in the former action is conclusive evidence of the law of Pennsylvania in a court of the United States, depends upon the further question whether the opinion is declaratory of the settled law of Pennsylvania as to the effect of such devises, or is a decision upon the construction of this particular devise.

"When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a state, that construction is to be followed by the courts of the United States in determining the title to land within the state, whether between the same or between other parties. Jackson v. Chew, 12 Wheat., 153, 167; Henderson v. Griffin, 5 Pet. 151; Swydam v. Williamson, 24 How., 427; Burgess v. Seligman, 107 U. S., 20, 33.

"But a single decision of the highest court of a state upon the construction of the words of a particular devise is not conclusive evidence of the law of the state, in a case in a court of the United States, involving the construction of the same or like words, between other parties, or even between the same parties or their privies, unless presented under such circumstances as to be an adjudication of their rights. Lane v. Vick, 3 How. 464, and Vick v. Vicksburg, 1 How. (Miss.), 379; Homer v. Brown, 16 How., 354, and Brown v. Lawrence, 3 Cush., 390; Gibson v. Lyon, 115 U. S., 439, 446.

"It becomes important, therefore, that the opinion of the supreme court of Pennsylvania in the former action of ejectment should be carefully examined and compared with the previous judgments of that court."

The court thereupon made an independent examination of the opinions of the supreme court of the state, for the purpose of comparing them with the opinion upon the particular clause involved with a view to seeing whether this last opinion was declaratory of the previously settled law of the state so as to amount to a rule of property. The result was that the court decided that such examination led them to the conclusion that "the decision of the supreme court of Pennsylvania upon the construction of the will of
401 James S. Stevenson is not conclusive; and that the first question certified must be answered in the negative."

That this court did not depart from any well-settled line of decisions by the supreme court of Ohio, applicable to the construction of the devise in the will of Henry Anderson which was involved, will be quite apparent upon examination of the opinion of this court, as reported in 146 Federal, 929, and a comparison with the opinion of the supreme court of Ohio construing the same clause, as reported in 79 Ohio State 23.

We found in the case of Shaw v. Hoard, 18 Ohio State, 228, an exposition of the applicable law of Ohio, which the opinion of the

supreme court of Ohio by Judge Summers concedes, "supports the contention of the plaintiff." We concluded from an examination of later cases in that court, that while in some particulars not relevant to the will of Henry Anderson, Shaw v. Hoard, had been distinguished, but had not been overruled. The supreme court of Ohio in Anderson v. Messinger, seems to conclude that, in effect, Shaw v. Hoard had been so far modified or distinguished as not to be conclusive evidence of the law in Ohio. Assuming for the purpose of this case that the effect of later decisions which did not expressly overrule that case was to unsettle it as a rule of decision, it clearly left the law of Ohio, considered as a local rule of property applicable to the words of the devise involved, in such an uncertain state as to compel this court to apply to the will the settled rules of the common law applicable. Upon this aspect of the matter Judge Severens said, that "if it should be held that the rule of construction is not settled, this court would decide the question upon its own understanding of the law applicable to it."

But it has been urged that we may not look to the opinion of the Ohio court for the purpose of determining the law of the case, but only to the syllabi of the case. The Ohio court has long since adopted a rule, that the law of the case by which the court is bound is that stated in the syllabi of the case. See Rule 6, 5 Ohio State, page 7 of the preface, and same rule, page 10, preface, of 73 Ohio State.

If we accede to this, we find no rule of property there
402* stated which necessarily conflicts with the opinion of this court.

That syllabus reads as follows:

"Where, in a will, there is a devise to a son, and if he dies without lineal descendants, living at the time of his decease, then over, these words are not, by themselves, without assistance from other parts of the will, sufficient to create an estate by implication in the lineal descendants, but the son takes a fee defeasible upon his death, without lineal descendants, living at the time of his decease, and in the event of lineal descendants living at the time of the son's death, his fee becomes absolute, and such descendants have no interest under the will as against his grantee."

This court found "assistance from other parts of the will," in reaching the conclusion we did, as will be seen by consulting the opinion. It will also be noticed that the opinion of the Ohio court, as exhibited by that of Judge Summers, does not deal with circumstances to which we attached importance.

But if we confine ourselves to this syllabus, it is impossible to say that from it alone we should be able to treat the decision as a declaration of the settled law of Ohio, constituting a rule of property, which this court ought to follow. It is apparently no more than an interpretation of a particular will, and as such, under the cases cited above, is not such a decision as we are under obligation to follow as a local rule of property.

There is, however, another reason why we should not now, if we had the power, retract our own opinion and adopt the subse-

quent view of the Ohio supreme court. This is found in the fact that there was then no settled line of decisions by the Ohio court applicable to the devise we were called upon to construe. This was a controversy between citizens of different states, and when, as was our duty, we reached a conclusion upon common law principles in the exercise of our independent judgment, we are now under no obligation to recede from that opinion merely because in another case the supreme court of Ohio has since reached a different result. Burgess v. Seligman, 107 U. S., 20, 33, 35.

403 A situation in principle much like this was presented in Burgess v. Seligman, cited above. A question arose as to the liability of shareholders of a corporation for its debts, under a Missouri statute. In an action in the circuit court of the United States at the suit of a creditor, the court held that under this satute persons holding shares as collateral security for a debt due from the corporation were not liable. In another case upon the suit of a different plaintiff, the supreme court of Missouri, after the decision of the circuit court of the United States, made a contrary decision against the same stockholders. It was held that upon the writ of error to the circuit court the supreme court was not bound to reverse the circuit court and follow this subsequent decision of the supreme court of Missouri. Among other things, the court said:

"The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such

404 cases, for the sake of harmony and to avoid confusion, the federal courts will lean toward an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own

dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between the citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. * * *

"In the present case, as already observed, when the transactions in question took place, and when the decision of the circuit court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transactions which the circuit court was called upon, and which we are now called upon to consider. It can hardly be contended that the federal court was to wait for the state courts to decide the merits of the controversy and then simply register their decision; or that the judgment of the circuit court should be reversed merely because the state court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so; but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion. Pease v. Peck, 18 How., 595, and Morgan v. Curtenius, 20 Id. 1, in which the opinions of the court were delivered by Mr. Justice Grier, are previously in point."

In Great Southern Fire Proof Hotel Co. v. Jones, 116 F. R., 793, affirmed in 193 U. S., 532, this court declined to follow the decision of the supreme court of Ohio holding a mechanic lien statute invalid in a suit involving rights of citizens of another state under contracts made before such decision was rendered. See also Louisville Trust Co. v. City of Cincinnati, 76 F. R., 296.

405 We do not wish to appear as passing over without notice the cases of Western Union Tel. Co. v. Poe, 61 Federal, 9; Sanford v. Poe, 69 Federal, 546, and Roberts v. Lewis, 153 U. S., 367. It is enough to say of the two Poe cases that they involved the construction of a statute of Ohio, relating to the taxation of corporations. Upon a demurrer, Taft, circuit judge, sitting on the circuit, overruled the demurrer and held the statute void as in conflict with the Ohio constitution. Afterwards, and before a final decree, the supreme court of Ohio held the act valid; thereupon Judge Taft withdrew his former judgment and followed that of the Ohio court. This we affirmed in 69 Federal, 546. There is no parallel between this and the Poe cases.

Judge Taft retracted his own and adopted the opinion of the supreme court of Ohio before a final judgment was entered, and he

merely recognized before his own final conclusion the controlling effect of the decision of the supreme court of Ohio.

In Roberts v. Lewis, cited above, the supreme court reversed a former construction of the will involved in Giles v. Little, 104 U. S., 291. The meaning of the will turned upon the bearing of the Nebraska statute. After Giles v. Little, the supreme court of Nebraska, in another case between other parties, but involving the same will, put a different construction upon the will. In Roberts v. Lewis, a third suit involving still other property dependent on the same will, but between still other parties, the court overruled Giles v. Little, and followed the decision of the Nebraska court, not because of any expressed obligation to abandon its own view, first taken, in deference to the later construction of the Nebraska court, but because it was convinced of error in its own opinion concerning the effect of the applicable Nebraska statute—an error due to the omission of a word in the copy of the statute before the supreme court. To that omitted word the Nebraska court gave weight in the meaning of the statute, and its bearing upon the meaning of the testator. This the Supreme Court of the United States thought required the overruling of its former opinion. There was no question of res adjudicata or law of the case involved.

406 But aside from what we have said touching the insistence that we should reverse ourselves and follow the later decision of the Ohio supreme court, we have upon a second writ of error no power to modify or reexamine the former judgment as to the will of Henry Anderson. It is not, as respects this case, a question of *stare decisis*, but one of res adjudicata. When our mandate went down and the term ended, that adjudication was beyond recall. Whatever of fact or law was then adjudged is beyond re-examination under any subsequent writ of error in the same case. The cases cited above determine this. To these we add: Loeser v. Savings Bank, 163 Federal, 212; Clark v. Keith, 106 U. S., 464; Illinois v. I. C. Rd. Co., 184 U. S., 77, 91; Ellis v. Northern Pac. Rd. Co., 80 Wis., 459; Haley v. Kilpatrick, 104 Federal, 647.

That the question arose in the court below under a plea of res adjudicata does not alter the principle involved. To give effect to that defense required that court to disregard the mandate and adjudication of this court. If this court is to regard that defense, it will require us to reverse our own former decision. The way the matter came up is peculiar, but the rule which applies is not thereby abrogated. "The law of the case" did not cease to be the law of the case because of the decision of some other court, in another suit between the same parties, involving other land under the same title.

There are cases in which the question of res adjudicata arose in the same way. Ellis v. Northern Pacific Rd. Co., 80 Wisconsin, 459, and Haley v. Kilpatrick, 104 Federal, 647; Theological Seminary v. The People, 189 Ill., 439, 446-7.

Ellis v. Northern Pacific Rd. Co., was an action to quiet title to land. The bill was by Ellis against the railroad company, and set out that the railroad company claimed title under a deed of donation from Douglas county, which deed was attacked as made without au-

thority. A demurrer was filed by the railroad company, and this, upon a writ of error, was overruled, the court holding that the deed was without authority of law and invalid. The case was remanded for further proceedings. After the commencement of the suit
407 mentioned in the state court, Ellis brought another suit, to quiet his title to other lands held by the Railroad company under the same instrument of donation, in the circuit court of the United States. In this latter case the judgment of the supreme court of Wisconsin, in the first case between the same parties, was not plead as an estoppel. The case was, therefore, tried out upon its merits, and the deed of donation held valid and the title of the railroad company good. Thereupon, the railroad company asked leave to amend its answer in the first case for the purpose of setting up this judgment of the circuit court of the United States as an estoppel to that action. Leave to amend for this purpose was denied. Upon the trial upon pleadings and evidence the record in this adjucation of the circuit court of the United States was offered in evidence, which offer was denied. It then appearing that the only title of the railroad company was under the agreement of donation, its title was held void, the court holding that the decision of the supreme court upon the writ of error was res adjudicata in the action. Thereupon, a second writ of error was sued out, under which the supreme court of Wisconsin held that its decision upon the former writ was conclusive upon the question of the validity of the donation upon which the title of this railroad company alone depended. The Wisconsin supreme court said:

"The decision of this court upon a demurrer upon the questions properly involved cannot be reviewed by the circuit court, nor, indeed, by this court, save upon motion for rehearing. Such questions are finally decided and settled for that case, and, as between the parties to that litigation, for all time. This view of the law decides this case. The complaint charged the appellant's alleged title to be just what the proofs now before us show it to be, and this court, prior to the judgment in the United States court, finally decided that such alleged title was worthless. The question was no longer an open one, and the circuit court was right in ruling out the record of the action in the United States court, and rendering judgment for the plaintiff."

A writ of error was sued out from the Supreme Court of the United States, upon the theory that the denial of the plea of res adju-
408 dicata involved the validity and effect of the decision of the federal courts when plead in bar of an action in a state court between the same parties, in respect to other property held under the same claim and title as that adjudged valid by the federal court. The writ was dismissed as not involving any federal question, the supreme court of Wisconsin having rested its decision upon the proposition that the rights of the parties had been adjudged upon the first writ of error, "and that it was itself, as the parties were, bound by its former judgment." Referring to the ground upon which the supreme court of Wisconsin had decided the case, the court said:

"The judgment before us was rendered in accordance with well-settled principles of general law, not involving any federal question,

and did not deny to the decree of the circuit court the effect which would be accorded under similar circumstances to the judgments and decrees of the state court." Northern Pacific Rd. Co. v. Ellis, 144 U. S., 458, 465.

In Great Western Telegraph Co. v. Burnham, 162 U. S., 339, 343, Mr. Justice Gray, referring to Northern Pacific Rd. Co. v. Ellis, cited above, said the decision of the supreme court of Wisconsin in holding itself and the parties concluded by the point decided upon a former writ:

"In so doing, that court has done no more than this court has always done, or than is necessary to enable an appellate court to perform its duties satisfactorily and efficiently, which would be impossible if a question once considered and decided by it, were to be litigated anew in the same case upon any new and subsequent appeal. Washington Bridge v. Stewart, 3 How., 413, 425; Roberts v. Cooper, 20 How., 467, 481; Clark v. Keith, 106 U. S., 464; Chaflin v. Taylor, 116 U. S., 567; Sanford Co., petitioner, 160 U. S., 247, 259."

In Haley v. Kilpatrick, 104 Federal, 647, the court said:

"This is the second appearance of this case in this court. * * *
The law of the case was settled in the opinion of the court
409 when the case was first here. It remains the law of the case
in this court, the decree of the state court in another and
different case to the contrary notwithstanding."

The other assignments of error are overruled. Some of them relate to other questions of fact or law decided upon one or the other of the former writs of error and are not now open for re-examination. The others have no merit and need no special consideration.

The judgment of the court below is without error and must be affirmed.

410 And afterwards to wit on July 15, 1909, a petition for rehearing was filed in said cause which is in the words and figures as follows:

Petition for Rehearing.

411 In the United States Circuit Court of Appeals for the Sixth Circuit.

No. 1916.

ROSEWELL E. MESSINGER, Plaintiff in Error,
v.
PETER ANDERSON, Defendant in Error.

Petition by Plaintiff in Error for Rehearing.

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Your petitioner, Rosewell E. Messinger, plaintiff in error in the above entitled proceeding in error, now comes and respectfully presents to this Honorable Court his petition for rehearing of this proceeding, for the following reasons:

412 1. This Court, by its decision herein, denied full faith and credit to the final decrees of the state courts.

With respect to the suits of the United States Mortgage & Trust Company, plaintiff, v. Peter Anderson, Rosewell E. Messinger et al., defendants, being Nos. 55,794 and 55,795, consolidated in the common pleas court of Lucas County, Ohio (Record, 150-202, 202-268), and Nos. 2,192 and 2,193, consolidated in the circuit court of Lucas County, Ohio (Record, 268-281-288), this Honorable Court, in the course of its opinion filed herein June 17, 1909, at the bottom of page 2 thereof says:

"The judgments of foreclosure in these cases were appealed from by Anderson, and the appeals were pending in the supreme court of Ohio when this cause was heard in the court below. Unless there is something exceptional in the statute of Ohio providing for appeals in equity cases, it is obvious that the judgments and decrees in these cases are lacking in that finality essential to support a plea of res adjudicata."

This Honorable Court was clearly mistaken in stating that appeals by Anderson in the foreclosure cases were pending in the supreme court of Ohio, when this cause was heard in the court below. Under the Ohio practice, judgments or decrees rendered by the circuit court are not appealable to the supreme court, and are only reviewable thereby upon petition in error.

Section 6710 R. S. O.

413 This Honorable Court in some way overlooked the undisputed record evidence that these consolidated actions were duly heard by the circuit court of Lucas County, Ohio, on March 9, 1908 (Record 281), and that a final decree was entered therein March 13, 1908 (Record 284); and probably by reason of this inadvertence, the Court did not examine the proceedings in

these consolidated actions with the care which otherwise it would, no doubt, have done.

With respect to the proceedings in these actions and the effect thereof, we refer the Court to our principal brief, filed herein in behalf of plaintiff in error, pages 18 to 30, both inclusive, and to our supplemental brief, pages 47 to 62, both inclusive.

This Honorable Court, in the course of its opinion herein, further says:

"We need not stop to look into this matter because, for the purposes of this case, it is enough to determine the legal effect of the judgment in Anderson v. United Realty Company and Messinger as a bar to this suit. If that was effectual, we must reverse the judgment. If it was not, the foreclosure decrees would not be, for the same reason, without going further."

From the record it clearly appears that the suits in equity in the state courts were in no wise in conflict with the former decisions of the Court in the case at bar; and we respectfully submit that the reasoning adopted by the Court whereby it determined the legal effect of the judgment of the state court in Anderson v. United Realty Company and Messinger as a bar to this suit, was not applicable to determine the legal effect of the final decrees in the state courts in the foreclosure suits.

414 2. We respectfully submit that the former decisions of this Court, although same declared and determined the law of the case upon the issues therein presented for consideration, did not warant the circuit court in disregarding and failing to give effect to the state judgments and decrees duly pleaded and proven upon the last trial of this case.

In discussing this question this Honorable Court, in the course of its opinion at page 17, after stating that it has, upon a second writ of error, no power to modify or re-examine its former judgment as to the will of Henry Anderson, which it holds is not a question of stare decisis but one of resadjudicata, further says:

"That the question arose in the court below under a plea of res adjudicata, does not alter the principle involved. To give effect to that defense required that court to disregard the mandate and adjudication of this court. If this court is to regard that defense, it will require us to reverse our own former decision. The way the matter came up is peculiar, but the rule which applies is not thereby abrogated."

We respectfully submit that this announcement of the law by this Court is contrary to the rule as established by the decision of the Supreme Court of the United States in the case of Chesapeake & Ohio Ry. Co. et al., plaintiff in error, v. Emma R. McCabe, Administratrix, defendant in error, No. 11, Volume 29 Supreme Court Reporter, p. 430, published May 1, 1909; 213 W. S. 207.

415 In this case the judgment of the court of appeals of Kentucky was reversed because that court upon a third appeal, believing itself bound by its former decisions in the same case as the law of the case, refused to give effect to a judgment of the circuit court of the United States between the same parties, with respect

to the same subject-matter, entered after the second hearing in the state court of appeals and duly pleaded and proven upon the last trial in the state circuit court.

If the law of the case as announced by the court of appeals of the state court did not warrant the state court in denying effect to a federal judgment duly pleaded and proven, it is difficult to perceive upon what principle this Court would be warranted in reaching an exactly opposite conclusion herein.

The case at bar was argued and submitted on May 4th and 5th, 1909, but the case of Railway Co. v. McCabe, published May 1, 1909, did not come to the attention of counsel for plaintiff in error until after this case had been argued and submitted.

It is possible that when this Honorable Court rendered its decision herein, it was not aware of the decision of the Supreme Court in Railway Co. v. McCabe.

This possibility, the importance of the questions under consideration and the direct bearing thereon of this late decision of the Supreme Court render it proper, we think, that we should now refer this Honorable Court thereto.

416 3. We respectfully submit that the case of Aurora City v. West, 7 Wall. 82, is consistent with the decision in Railway Co. v. McCabe above cited, and is a decision of binding effect upon the Court in the case at bar.

This Court, at page 8 in its opinion, correctly states that the question therein decided arose upon demurrer to a rejoinder setting up merely that a judgment of an inferior state court had been reversed in an appellate tribunal and remanded for further proceedings; but the Supreme Court, in passing upon this question, in the course of its opinion, at page 93 expressly says:

"Unless a final judgment or decree is rendered in a suit, the proceedings in the same are never regarded as a bar to a subsequent action."

We respectfully submit that this language in the opinion sustains the headnote in the case, viz.:

"A reversal in a court of last resort, remanding a case, cannot be set up as a bar to a judgment in an inferior court in the same case."

For each and all of the foregoing reasons, your petitioner humbly prays the Court to afford him relief by granting him a further hearing herein, and that upon such rehearing the judgment of this Court herein may be reversed and judgment entered in favor of your petitioner, reversing the judgment of the circuit court, and that the Court generally shall award to said petitioner such relief

417 as to this Honorable Court may seem just.

And your petitioner will ever pray.

OLIVER B. SNIDER,
CLAYTON W. EVERETT,
KING, TRACY, CHAPMAN & WELLES,
Attorneys for Petitioner.

The undersigned, Harry E. King, hereby certifies that he is a member of the firm of King, Tracy, Chapman & Welles, and one of

the attorneys for the petitioner named in the foregoing petition for rehearing; that said petition for rehearing is not interposed for delay; and that in his judgment it is well founded and should be granted by this Honorable Court.

HARRY E. KING.

418 And afterwards towit on October 11, 1909, an application for stay of mandate was filed which reads and is as follows:

Application for Stay of Mandate.

419 In the United States Circuit Court of Appeals for the Sixth Circuit.

ROSEWELL E. MESSINGER, Plaintiff in Error,
v.
PETER ANDERSON, Defendant in Error.

Application for Stay of Mandate and Proceedings under Judgment of Affirmance Herein.

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Your petitioner, Rosewell E. Messinger, plaintiff in error in the above-entitled proceeding in error, respectfully prays this Honorable Court to grant a stay of the mandate of the proceedings under judgment of affirmance herein for such reasonable time as to this Court may seem necessary to allow your petitioner to apply to the Supreme Court of the United States for a writ of certiorari to review the judgment and proceedings herein.

420 Your petitioner, by his attorneys, respectfully represents and certifies to this Honorable Court that this application is made in good faith and not for the purpose of delay, and solely to enable your petitioner to apply to the Supreme Court of the United States for writ of certiorari to review the proceedings herein.

Respectfully submitted,

OLIVER B. SNIDER,
CLAYTON W. EVERETT,
KING, TRACY, CHAPMAN & WELLES,
Attorneys for Petitioner.

421 STATE OF OHIO,
Lucas County, ss:

Rosewell E. Messinger, being first duly sworn, deposes and says that he is the petitioner above-named; that the foregoing application is made by him in good faith, and not for the purpose of delay; and that the facts stated therein are true.

ROSEWELL E. MESSINGER.

Sworn to before me and subscribed in my presence this 11th day of October, 1909.

[SEAL.] HARRY E. DUGUID,
Notary Public, Lucas County, Ohio.

422 And on the same day towit October 11, 1909, a stipulation to stay mandate was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

ROSEWELL E. MESSINGER, Plaintiff in Error,
vs.
PETER ANDERSON, Defendant in Error.

Stipulation.

It is hereby stipulated by and between the parties to the above entitled proceeding in error that should said Circuit Court of Appeals deny or dismiss the petition for rehearing now pending before it, then the mandate in said cause may be stayed for a period of thirty (30) days from the date of such ruling on said petition for rehearing, for the purpose of affording plaintiff in error reasonable time within which to prepare and present to the Supreme Court of the United States a petition for certiorari herein.

In witness whereof, said parties by their respective attorneys, have executed this stipulation this 11th day of October, 1909.

423 C. W. EVERETT,
OLIVER B. SNIDER,
KING, TRACY, CHAPMAN & WELLES,
Attorneys for Plaintiff in Error.
R. P. CARY,
C. H. TRIMBLE,
Attorneys for Defendant in Error.

And on the same day towit October 11th, 1909, an order denying petition, etc., was entered in said cause which reads and is as follows:

424 United States Circuit Court of Appeals for the Sixth Circuit.

No. 1916.

ROSEWELL E. MESSINGER, Plaintiff in Error,
vs.
PETER ANDERSON, Defendant in Error.

Petition for rehearing filed herein is hereby denied. Upon application of the Plaintiff in Error and stipulation of the parties con-

senting thereto, it is hereby ordered that the mandate of this Court be stayed for thirty days from today.

Enter this.

LURTON, *J.*

October 11th, 1909.

425 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Rosewell E. Messinger is plaintiff in error and Peter Anderson is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Northern District of Ohio, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay
426 to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the ninth day of November, in the year of our Lord one thousand nine hundred and nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

In pursuance of the command of the foregoing writ of certiorari I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, hereby transmit a complete copy of the record and proceedings as therein directed; and I hereby certify that the foregoing pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of the said United States Circuit Court of Appeals for the Sixth Circuit, in a certain cause between Rosewell E. Messinger and Peter Anderson, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the United States Circuit Court of Appeals for the

Sixth Circuit, at the city of Cincinnati, in said Circuit this 29th day of November A. D. 1909.

[Seal United States Circuit of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

427 [Endorsed:] File No. 21,874. Supreme Court of the United States, No. 648, October Term, 1909. Rosewell E. Messinger, Petitioner, vs. Peter Anderson. Writ of Certiorari. Filed Nov. 11, 1909. Frank O. Loveland, Clerk.

428 [Endorsed:] File No. 21,874. Supreme Court U. S. October Term, 1909. Term No. 648. Rosewell E. Messinger, Petitioner, vs. Peter Anderson. Writ of Certiorari and return. Filed December 1st, 1909.

5

Office Supreme Court, U. S.
FILED.
DEC 14 1911
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 150.

ROSEWELL E. MESSINGER,

Petitioner,

vs.

PETER ANDERSON,

Respondent.

BRIEF AND ARGUMENT FOR PETITIONER.

HARRY E. KING,
OLIVER B. SNIDER,
CLAYTON W. EVERETT,
Counsel for Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 150.

ROSEWELL E. MESSINGER,

Petitioner,

vs.

PETER ANDERSON,

Respondent.

BRIEF AND ARGUMENT FOR PETITIONER.

HARRY E. KING,
OLIVER B. SNIDER,
CLAYTON W. EVERETT,
Counsel for Petitioner.

INDEX

Brief and Argument for Petitioner..... 1
I. Statement of the Case..... 1
II. Abstract of Issues and Proceedings..... 2
III. Statement of Essential Facts..... 12
1. Events Within the Lifetime of Henry Anderson 12
2. Events After Death of Henry Anderson and Before James H. Anderson Became 25 Years of Age..... 16
Statement of Note to Henry Anderson.. 19
3. Events After June 25, 1856, When James H. Anderson Became 25 Years of Age to Beginning of This Action..... 22
4. Statements Concerning Property Involved in Actions in Federal and State Courts.. 26
IV. Assignment of Errors..... 27
Recapitulation 47
1. Summary of Proceedings..... 47
2. Claims of the Parties Concerning Title.. 48
V. Brief of the Argument..... 50
Effect of Reversal and Remandment for Retrial Without Directing Final Judgment.. 50
The Circuit Court of Appeals Erred in Its Construction of the Anderson Will..... 51
The Will 51
Peter Anderson Acquired No Title Under the Will of His Grandfather..... 58
Decisions Construing Statutes Like the Ohio Statute 62
Independently of Statute the Will Devised Only a Defeasible Fee 66
The Will Did Not Create a Remainder by Implication 73
Definite and Indefinite Failure of Issue..... 73
The Clear Weight of Authority is Against the Construction of the Will Adopted by the Circuit Court of Appeals..... 76

Other Errors in the Decision and Judgment of the Circuit Court of Appeals..... 81
1. In Disregarding and Failing to Give Effect to the Disposing or Operative Parts of the Will 81
2. In Failing to Fully Consider and Give Effect to All Parts of the Will..... 82
3. In Failing to Distinguish Between Definite and Indefinite Failure of Issue..... 82
4 In Following the Case of Shaw vs. Hoard, 18 O. S., 227..... 82
5. The Circuit Court of Appeals Also Erred in Its Conclusions With Respect to the Following Ohio Cases Cited by it in Support of Its Opinion..... 85
The Doctrine of an Implied Remainder Adopted by the Circuit Court of Appeals is Opposed to the Weight of Authority.. 87
In Wills Similar to That of Anderson's, the Death Referred to Has Been Held to be a Death Within the Lifetime of the Testator 90
VI. Errors Concerning Title Acquired by Henry Anderson by Master's Deed in Foreclosure Proceedings, and Contract of October 4, 1844..... 92
Once a Mortgage, Always a Mortgage..... 92
Butler's Equity of Redemption Not Released by the Contract of October 4, 1844.... 95
VII. Errors in the Admission of Evidence..... 99
In Chief 99
In Rebuttal 99
Petitioner's Record Title was Destroyed by Incompetent Evidence 100
VIII. Charles Butler Paid His Debt in Full....103
Payments by Butler.....105
IX. When Butler Paid His Indebtedness it was the Duty of Anderson's Trustees to Execute and Deliver Deed to Him.....114
The Deed of the Trustees Conveyed the Legal Title 115
X. Disregard of Ohio Statutes and of Presumptive Evidence Defeated Petitioner's Right of Trial by Jury.....117

The Deed of the Executors and Trustees was a Final and Complete Release.....120
XI. The Deed of the Executors and Trustees was Delivered in Escrow in October, 1855, and Justice Requires that it be Given Effect From Said Date.....123
XII. The Legal Title to the Toledo Property was Conveyed to Charles Butler by Deed From Edward Bissell, Dated February 22, 1843 (Exhibit F). (Tr., 37).....130
The Evidence Shows no Consideration Paid by Henry Anderson for Deed From Master Commissioner 131
XIII. Error in Reversing Second Judgment.....135
XIV. The Federal Courts Denied Full Faith and Credit to State Judgments and Decrees..136
The First Final Judgment Was in the State Court and Closed the Controversy.....136
The Law of the Case Did Not Impair Defense of Res Adjudicata 152
XV. Custody of Property in State Court.....155
XVI. The Circuit Court and the Circuit Court of Appeals Each Disregarded the Statutes and Decisions of Ohio Relative to Tax Titles156
Legislation Respecting Tax Titles was Constitutional 158
Butler Not Estopped to Take or Assert Tax Title 170
Statute of Limitations Took Effect When Tax Sale was Made.....170

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 150.

ROSEWELL E. MESSINGER,

Petitioner,

vs.

PETER ANDERSON,

Respondent.

BRIEF AND ARGUMENT FOR PETITIONER.

I.

STATEMENT OF THE CASE.

This case is before this court upon writ of *certiorari* issued to the circuit court of appeals for the sixth circuit. It presents for review all proceedings in that court in case No. 1916, therein, entitled Rosewell E. Messinger, plaintiff in error, vs. Peter Anderson, defendant in error, and in two former cases therein, Nos. 1479 and 1679, respectively,

each entitled Peter Anderson, plaintiff in error, vs. Rosewell E. Messinger, defendant in error, and seeks the reversal of the several judgments of the circuit court of appeals, in each of said cases and of the last judgment rendered by the circuit court for the northern district of Ohio, western division, in case above designated as No. 1916.

II.

ABSTRACT OF ISSUES AND PROCEEDINGS.

December 27, 1904, respondent, Peter Anderson, a citizen and resident of Tennessee, brought an action at law, in ejectment, in the circuit court of the United States for the northern district of Ohio, western division, against petitioner, Rosewell E. Messinger, a citizen and resident of Ohio, wherein Anderson sought to recover from Messinger the possession and damages for the wrongful detention since September 16, 1902, of lots 20, 21, except the southeast 19 feet of the southwest 80 feet thereof, 30, 31, 32, 33, 1008 and 1009, in the Vistula Division of Toledo, Lucas county, Ohio, comprising nearly half a block of improved central real estate in the business section of said city, exceeding $100,000.00 in value. (Transcript of Record, 6.) (Hereinafter abbreviated "Tr.")

To the petition in this action, the defendant therein, the petitioner here, filed a general denial. (Tr., 7.)

At the June term, 1905, the case was first tried in the circuit court before Hon. Robert W. Tayler, a jury being waived, and resulted in a judgment in favor of Messinger. (Tr., 10.)

July 25, 1905, respondent, by the same attorneys, brought another action in ejectment, No. 53924, in the common pleas court of Lucas county, Ohio, against the petitioner and others, to recover the remaining part of the same block of property and other property, respondent basing his claim on the same will.

This action was entitled Anderson vs. The United Realty Co., Messinger, et al., and involved the same questions of fact and law as were involved in the action in the federal court. After trial on the merits, judgment was rendered therein March 31, 1906, in favor of defendants, including your petitioner. On proceedings in error by respondent, this judgment was affirmed by the Lucas county circuit court, January 25, 1907 (19 Circuit Decisions, 267; 29 Ohio Circuit Court Rep., 267) and by the supreme court of Ohio, November 10, 1908 (79 O. S., 23). On writ of error (No. 27, October term, 1911), sued out by respondent, this judgment (Tr., 322) was on December 4, 1911, affirmed by this Honorable Court.

In the case in the federal circuit court, respondent sued out a writ of error to the circuit court of appeals, and on June 5, 1906, the judgment of the circuit court was reversed, and the case was remanded for a new trial. (Tr., 68, 69.) (146 Fed., 929.)

The opinion of the circuit court of appeals appears in the transcript at page 69.

At the December term, 1906, the case was again tried in the federal circuit court upon the same pleadings, before Hon. Robert W. Tayler, judge, and a jury. In addition to the facts proved upon the former trial Mes-

singer also proved and relied upon title established by certain tax deeds given by the city of Toledo to Charles Butler. At the conclusion of all the evidence respondent and petitioner each moved the court to instruct the jury to render a verdict. The court overruled respondent's motion and granted that of petitioner, and a verdict was accordingly rendered in favor of petitioner, and judgment was entered thereon. (Tr., 114.)

October 25, 1906, the United States Mortgage & Trust Company commenced two actions in the common pleas court of Lucas county, Ohio, to foreclose two mortgages for $45,000 and $18,000, respectively, and interest, given this company by your petitioner and wife in 1897 and 1903, respectively, on the entire property, except lot 33, shown on plat at page 26 herein, joining as defendants to each action petitioner, his wife, respondent and other parties. (Tr., 400.) November 15, 1906, petitioner filed answer and cross-petition in each of these actions, making respondent and others parties defendant thereto; and thereupon separate summons was duly issued on respondent and other parties (Tr., 407, 453). Thereafter, respondent voluntarily appeared in each of these suits and duly obtained general leave to answer, and thereafter pleaded therein (Tr., 412, 458).

The issues were duly joined therein (see petitioner's amended and supplemental answers and cross-petitions herein (Tr., 427, 473); respondent's answers thereto (Tr., 435, 481); and petitioner's replies thereto (Tr., 441, 487). These cases were then consolidated by consent and were duly heard by the court of common pleas

on the pleadings and the evidence (Tr., 490), and on June 5, 1907, final decrees were duly entered in said consolidated suits in favor of the first and second mortgagees, respectively, and in favor of petitioner, and against respondent. (Tr., 493, 494.)

Upon all the issues joined therein between petitioner and respondent, the court found that the equities were with petitioner, and that respondent had no claim, right, title, estate or interest in the mortgaged premises; that Henry Anderson, under whom respondent claims, held title thereto in trust for Charles Butler, as security for a debt; that Butler paid said debt in full, and that the representatives of Anderson's estate had duly released and discharged same; that petitioner was entitled to a proper deed of release and quit-claim from respondent, which he was ordered to execute and deliver within three days; and that in default thereof, the decree of the court should operate as such conveyance, the title of petitioner to said premises by said decree being duly quieted, and respondent barred and forever enjoined from setting up, asserting or claiming any interest, right, title or estate therein or thereto. (Tr., 494, 495.)

On May 6, 1907, an execution was duly issued in said consolidated suits by the court of common pleas of Lucas county, Ohio, to the sheriff of said county, and was on the same day duly levied upon all the property in controversy. (Tr., 520, 521.)

Respondent appealed from this decree to the Lucas county, Ohio, circuit court (Tr., 502), where these consolidated suits were duly heard at the January term, 1908; and

on April 4, 1908, final decree was entered therein as to part of the premises in controversy. (Tr., 515, 518.)

The court found the allegations in petitioner's pleadings true, and that the equities upon the issues joined in said consolidated actions were with him, and that the defendant, Peter Anderson (respondent here), had in equity no claim, right, title, estate or interest whatsoever in or to said part of said premises. (Tr., 518.)

The decree then proceeds as follows:

> "And the court further finds that said defendant and cross-petitioner, Rosewell E. Messinger, is in equity the owner in fee simple of said above described property and is entitled to have his title thereto quieted as against said defendant, Peter Anderson, and to have a release, discharge and conveyance from the defendant, Peter Anderson, of any and all estate, claim, interest, lien or title which he has or claims to have in, to or against said above described premises; that a certain instrument executed by Edson Allen, master commissioner, to Henry Anderson, dated November 18, 1844, and recorded in volume 10 at page 168 and following of the records of deeds of Lucas county, Ohio, was in fact, as to Charles Butler, who was then the owner of said above described property, a mortgage, and such title as said Henry Anderson took to said property by virtue of said instrument, was taken and held by him in trust as security for the payment of the indebtedness evidenced by note dated July 1, 1841, for $20,000 described in the amended and supplemental answers and cross petitions of the defendant and cross-petitioner, Rosewell E. Messinger, then owing by said Charles Butler to said Henry Anderson, and for no other purpose; and that thereafter said Charles Butler duly paid

to said Henry Anderson, and to the executors of his said estate, said debt in full, and that said executors of Henry Anderson duly released and discharged said Charles Butler from any and all claims which the estate of said Henry Anderson had theretofore held against him, and conveyed all of the title theretofore held by said Henry Anderson, and by them as his said executors, in and to said property, to the said Charles Butler, and forever released and discharged said Charles Butler from any and all debts, claims and demands of every kind which said Henry Anderson or his said executors had theretofore held or owned as against said Charles Butler.

"To each and all of which findings said defendant, Peter Anderson, duly excepted.

"And it is therefore hereby ordered, adjudged and decreed that within three (3) days from the entry hereof said defendant, Peter Anderson, shall execute and deliver to said defendant and cross-petitioner, Rosewell E. Messinger, a proper deed of release and quit-claim of any and all such claims, interest, lien or title of the said defendant, Peter Anderson, in or to said above described premises, and each and every part thereof, and the improvements, privileges and appurtenances thereunto belonging, and that in default of said defendant, Peter Anderson, so executing and delivering such deed within the time last aforesaid, this decree shall operate as such conveyance: and the title of said defendant and cross-petitioner, Rosewell E. Messinger, to said above described parts of said lots nineteen (19) and twenty-one (21) in the Vistula division of the city of Toledo, Lucas county, Ohio, is hereby quieted as against said defendant, Peter Anderson, and any and all persons claiming under him, and said defendant, Peter Anderson, is hereby barred and forever enjoined from setting up, assert-

ing or claiming any claim, interest, lien, right, title or estate in or to said premises, or any part thereof.

"To which decision, decree and orders, and to each and every part thereof, said defendant, Peter Anderson, duly excepted." (Tr., 518-520.)

The court further ordered that the matters in controversy with respect to the remainder of the premises should be reserved for further consideration and decision, with leave to any of the parties to make such further appplication to the court for the due protection and preservation of their rights as might be necessary.

In the case in the federal circuit court now under review, respondent sued out a second writ of error to the circuit court of appeals, and on December 17, 1907, the judgment of the circuit court was reversed, and the case again remanded for a new trial (Tr., 253), (158 Fed., 250). The opinion of the circuit court of appeals appears in the transcript at page 254.

Petitioner on leave from the federal circuit court filed an amended and supplemental answer herein (Tr., 268), setting forth therein three defenses:

1st. A general denial.

2nd. *Res adjudicata* and estoppel, by reason of final judgment of the common pleas court of Lucas county, Ohio, *rendered March 31, 1906*, in case No. 53,924 therein, entitled Anderson vs. The United Realty Co., Messinger, et al.

3rd. Estoppel and bar, by reason of the findings and final decree of the common pleas court of Lucas county, Ohio, rendered June 5, 1907, in Nos. 55,794 and 55,795 in said court, entitled United States Mortgage & Trust Co. vs. Anderson, Messinger, et al., and United States Mortgage & Trust Co. vs. Messinger, Anderson, et al. (Tr., 268-286).

Thereafter, petitioner on leave filed a supplement to the third defense of his amended and supplemental answer (Tr., 293-297), setting forth the proceedings upon Anderson's appeal to the circuit court of Lucas county, Ohio, in the consolidated foreclosure suits, and respondent, in due course, filed replies to petitioner's amended and supplemental pleadings (Tr., 287, 298).

On June 2, 1908, the first day of the term, petitioner duly made application in writing to the federal circuit court for an order staying further proceedings in the case until there had been a final decision by the supreme court of the state of Ohio in one or both of the actions in the state court. This application was heard upon evidence, and was overruled, to which ruling petitioner duly excepted, and took bill of exceptions with respect thereto. (Tr., 291, 300.)

Thereupon, at the June term, 1908, the third trial in the circuit court was had before Hon. Robert W. Tayler, judge, and a jury; and at the conclusion of all the evidence, on motion by respondent, the court, against objection and exception thereto by petitioner, directed the jury to return a verdict in favor of respondent, finding him entitled to the possession of the property described in the petition and assessing his damages for the wrongful withholding of possession of said property at $46,904, which verdict was returned accordingly, and judgment was thereupon entered thereon (Tr., 300).

A transcript of the entire record in Anderson vs The United Realty Co., Messinger, et al., including bill of exceptions therein (Tr., 322-399), and a transcript of the entire record in the Lucas county, Ohio, common pleas and circuit courts in the consolidated foreclosure suits, entitled United States Mortgage & Trust Co. vs. Anderson, Messinger, et al. (Tr., 400-520), were each duly offered and received in evidence upon said last trial.

On November 10, 1908, the supreme court of Ohio rendered its decision in the proceeding in error prosecuted thereto by respondent, affirming the judgment of the lower courts in Anderson vs. The United Realty Co., Messinger, et al. (79 O. S., 23).

Thereupon, *within the June term, 1908*, petitioner duly made an application to the federal circuit court for an order vacating and setting aside the judgment rendered in the action of ejectment in said court and for a new trial, basing this application upon the decision of the supreme court of Ohio, during the same term.

November 30, 1908, and within the June term, this application was duly heard upon evidence and denied, exception was entered, and bill of exceptions taken (Tr., 574-581). ~~Respondent~~ Petitioner also took a bill of exceptions setting forth the proceedings in the federal circuit court, and after duly moving for a new trial, and after determination of proceedings under the statutes of Ohio for the benefit of occupying claimants of real estate, on November 30, 1908, filed assignment of errors and sued out a writ of error to reverse the judgment of said court (Tr., 586-608).

This was heard before the circuit court of appeals, May 4, 1909, and on June 8, 1909, the court affirmed the last judgment of the circuit court (Tr., 611), (171 Fed., 785). The opinion of the circuit court of appeals appears in the transcript at page 586.

July 15, 1909, petitioner filed a petition for rehearing in the circuit court of appeals. This was denied October 11, 1909, and on the same day petitioner duly made application to said court to stay its mandate and proceedings under its judgment of affirmance herein, to allow petitioner an opportunity to apply to the Honorable the Supreme Court of the United States for a writ

of *certiorari* to review the said judgment and proceedings. This application was granted and the mandate ordered stayed for thirty days. (Tr., 626-631.)

On November 9, 1909, this Honorable Court granted petitioner's application for writ of *certiorari*, and as required thereby, a duly certified copy of the entire record of the proceedings in said case in the circuit court of appeals, upon each of the three hearings therein, known as Nos. 1479, 1679 and 1916, has been duly transmitted to and filed in this court.

III.

STATEMENT OF ESSENTIAL FACTS.

The essential facts shown by the record herein are substantially undisputed and are in substance as follows:

Respondent is the grandson and only living descendant of Henry Anderson, who died April 3, 1846, leaving a will under which respondent claims the property in controversy.

1. Events Within the Lifetime of Henry Anderson.

Petitioner and respondent each derives his claim of title from Edward Bissell, who in 1838 owned the premises, the title to which is in controversy between petitioner and respondent herein and in the several actions in the state courts.

May 19, 1838, Edward Bissell gave his bond to Charles Butler, of New York, for $21,500, payable one year after date with interest, and duly secured the payment thereof to Butler by a mortgage on said and other Toledo property, which mortgage was duly recorded.

July 1, 1841, Henry Anderson, then a resident of Holly Springs, Mississippi, loaned $20,000 to Charles Butler, then a resident of New York City, *upon the unsecured note* of Butler, payable one day after date with interest.

At least as early as September 21, 1841, Charles Butler and Henry Anderson had become mutually interested in certain transactions with the American Land Company, whereby they were each to be paid, and agreed to equally divide, certain commissions as same might accrue to them from said company for warranting the title to certain western lands. (Tr., 38-40.)

September 23, 1841, Charles Butler assigned the Bissell bond and mortgage to Henry Anderson in trust, as collateral

security for the payment of Butler's note dated July 1, 1841, for $20,000, which assignment was on September 30, 1843, duly recorded on the margin of the public record of the Bissell mortgage, same being (Tr., 309), as follows:

> "Assignment: I hereby assign this mortgage to Henry Anderson on certain trusts set forth in a deed this day made. September 23, 1841.
>
> "CHARLES BUTLER."

As further security, Butler also assigned to Anderson 546 shares of the stock of the Erie & Kalamazoo Railroad company, of the par value of $50 each.

By deed dated February 22, 1843, recorded October 11, 1849, Edward Bissell and wife conveyed the entire property covered by this mortgage to Charles Butler, who, after the date of said deed, was continuously in possession and control of said premises and paid all of the taxes and assessments thereon until a sale was made by Butler to Calvin Bronson during the early part of 1860.

September 19, 1843, Henry Anderson, as the assignee of the Bissell mortgage, filed a bill in chancery in the court of common pleas of Lucas county, Ohio, against Edward Bissell and others to foreclose said mortgage.

Charles Butler, although named as a defendant, was not served with subpoena or other process, and in no manner entered his appearance in this action, and the court acquired no jurisdiction therein over him, and in the bill no allegations were made against him (Tr., 310).

April 1, 1844, a decree was entered in this action ordering the premises to be advertised and sold according to law for the payment of $29,139.01 found due Anderson on the Bissell bond and mortgage, and Edson Allen was appointed master commissioner in chancery to make said sale.

September 24, 1844, the mortgaged property was sold by the master commissioner to Henry Anderson for $6,921, being more than two-thirds of the appraised value thereof (Tr., 310-369).

Prior to October 4, 1844, this sale was duly reported to and confirmed by the court, and a deed was ordered made in accordance therewith (Tr., 553, 367).

October 4, 1844, Anderson and Butler entered into a written agreement, wherein it was recited:

That Butler had assigned the Bissell bond and mortgage to Anderson as collateral security for the payment of $20,000 note theretofore given by Butler to Anderson;

That proceedings in relation to the Bissell bond had been taken by Anderson, and that an order for sale of the mortgaged premises had been made and confirmed;

That a decree or judgment for deficiency might be obtained in favor of Anderson against Bissell;

That Butler as further collateral security for the payment of his $20,000 note in favor of Anderson, had also assigned to Anderson certain shares of railroad stock of the par value of $27,300;

That Anderson, at the request of Butler and in consideration of the covenant of Butler in said agreement contained, was willing to relinquish and surrender to Butler *the* collateral securities so assigned as aforesaid for the payment of said note of $20,000, so far as same might be done without prejudice or injury to the order obtained for sale of said premises and the rights of Anderson under the same, *and without prejudice to the personal liability of Butler to Anderson on the principal debt.*

The contract then provides as follows:

In consideration of the premises and for the purpose of giving effect to the same, Anderson has at this date executed and delivered a power of attorney to Butler, authorizing him if he sees fit to do so, to release and discharge Bissell from all personal claims on said bond and mortgage, but without prejudice to the proceedings which have been or may be adopted to effect the sale of said mortgaged premises; and that Anderson has also, in writing, released and transferred to Butler the shares of railroad stock.

Butler, in consideration of the surrender and relinquishment of the said securities, covenants and agrees with Anderson that the same shall not be held or construed in any way to affect or impair the liability of Butler on said note for $20,000; and Butler also covenants and agrees with Anderson that he, Butler, will apply and pay over to Anderson on account of said note any money or other consideration which he, Butler, may receive or derive by reason of the surrender and relinquishment of the securities aforesaid by Anderson (Tr., 553).

December 24, 1844, by deed dated November 18, 1844, Edson Allen, master commissioner, conveyed to Anderson such title to said mortgaged property as said Anderson was capable of acquiring; recorded December 27, 1844 (Tr., 367-370).

The record discloses no evidence showing or tending to show any knowledge or notice whatsoever by purchasers from Butler or of those claiming under such purchasers, of the agreement of October 4, 1844, between Anderson and Butler; and petitioner contends that he was and is in no respect bound thereby, and further contends that the title acquired by him could be in nowise thereby affected.

As above stated, Henry Anderson died April 3, 1846, a resident of Mississippi, leaving a will, a copy of which appears in the transcript of the record at pages 312 to 316, and in the assignment of errors at page 30 of this brief.

Henry Anderson left surviving him two sons, his only heirs at law:

William Anderson, born February 12, 1828.

James H. Anderson, born June 25, 1831.

William Anderson died intestate during January, 1850, unmarried and without issue.

James H. Anderson died intestate September 16, 1902, leaving surviving him his only child and heir at law, the respondent, Peter Anderson, who was born August 27,

1859, and who is the grandson, only grandchild and only living descendant of Henry Anderson, deceased.

It therefore appears that William Anderson became twenty-one years of age February 12, 1849; and that James H. Anderson became twenty-one years of age June 25, 1852, and therefore attained his twenty-fifth year June 25, 1856 (Tr., 317).

Charles Butler died December 13, 1896.

Mr. Butler and Mr. Anderson were capable and experienced men of affairs, and so far as appears, the relations between them were always friendly.

The first transaction between them shown by the record was the loaning by Anderson to Butler on July 1, 1841, of the large sum of $20,000 upon Butler's unsecured note. (Tr., 527.)

The next was an agreement between them on September 21, 1841, providing for the investment by Anderson or his representatives for fifteen years, of certain commissions in which Anderson and Butler were equally interested, the net amount of which in 1848 was about $12,000.

And the last transaction between these gentlemen, shown by the record, was the contract of October 4, 1844. (Tr., 553.)

2. Events After Death of Henry Anderson and Before James H. Anderson Became 25 Years of Age.

Shortly after the death of Mr. Anderson in 1846, his will was duly probated before the probate court of Marshall county, Mississippi, and Walter Goodman, Peter Anderson and Peter W. Lucas duly qualified as executors and trustees thereunder and entered upon the discharge of their duties (Tr., 312).

April 20, 1860, fourteen years after probate in Mississippi, Henry Anderson's will was filed and admitted to probate and

record in the probate court of Lucas county, Ohio (Tr., 526).

After the appointment of the executors and trustees, they made and returned to the probate court of Marshall county, Mississippi, an inventory of the personal assets of the estate of Henry Anderson, deceased, and included therein the note given by Charles Butler to Henry Anderson July 1, 1841, for $20,000 (Tr., 527, 528).

The fact that Anderson held the Bissell property, including the premises in controversy herein, in trust to secure a debt from Butler, was fully investigated, and as early as October 10, 1849, a distinct understanding to this effect was reached between Anderson's sons and his executors and trustees and Mr. Butler; and it is important to note that it was at this date that Butler made his first payment in cash to the executors on account of his indebtedness. (Tr., 561, 527.)

Upon the last trial in the circuit court, Anderson produced from the custodian of the papers of the estate of Charles Butler, deceased, and offered in evidence the following instruments:

1st. An unrecorded contract (Tr., 561) between Charles Butler and William Anderson dated October 10, 1849, wherein it is recited that Henry Anderson held the title to the premises acquired in foreclosure by master's deed, in trust to secure Butler's note dated in July, 1841, for $20,000 and interest, and William Anderson, as heir at law of Henry Anderson, declared that he held said property in trust as security for the payment of the same indebtedness and agreed on the payment thereof to execute and redeliver to Charles Butler, his heirs or assigns, a full and complete release of his title to all of said premises, Butler therein agreeing to pay said note to the executors of Henry Anderson with interest, at dates and in amounts therein specified, and that he would also pay all taxes and assessments on said premises. It was further agreed that the amount due Butler from the Anderson

estate under contract for commissions for warranting title to lands sold for the American Land Company, should be applied upon the payment of said note.

2d. A written instrument dated September 16, 1851, duly executed and delivered to Charles Butler by James H. Anderson in the presence of W. Goodman and P. Anderson (two of the executors and trustees) and S. H. Fleetwood, and duly acknowledged before the latter as a commissioner for the state of New York, which recited the same facts and evidenced substantially the same agreement as did the above-mentioned contract between William Anderson and Charles Butler (Tr., 564-566).

3. Also an unrecorded written agreement between James H. Anderson and Charles Butler supplemental to and endorsed on the foregoing agreement of September 16, 1851, duly executed, sealed, delivered and acknowledged October 1, 1852, providing for an extension of Butler's indebtedness. (Tr., 566.)

Defedant below, petitioner here, offered the following evidence and admissions with respect to payment of Butler's indebtedness:

1.

An account stated and receipt thereon (Tr., 527, 525) as follows:

Statement of Note to Henry Anderson.

October 1, 1852.

1 July, 1841, note for		$20,000.00
Inst. to 1 Oct., 1855, 11 years, 3 mos., 6 per cent.		13,500.00
		$33,500.00

Cr.

1 June, 1848, 1-2 of ac. coms. (11,934.97)	$5,967.49	
Inst. to 1 Oct., '52, 4 yrs. 4 mos.	1,551.42	
1 June, 1852, 1-2 of ac. (624.31)	312.15	
Inst. 4 mos.	6.24	
	$7,837.30	
Less 1-2 of coms. refunded on sales cancelled and inst.	312.24	
		$7,525.06
1 Oct., 1849, cash paid	3,376.52	
Inst. to Oct. 1, 1852, 3 yrs.	607.86	
		3,984.38
1 Oct., 1850, cash paid	2,700.00	
Inst. to 1 Oct., 1852, 2 yrs.	324.00	
		3,024.00
1 Oct., 1851, cash paid	3,110.00	
Inst. to 1 Oct., 1852, 1 yr.	186.60	
		3,296.60
		$17,830.04
Leaving due 1 October, 1852		$15,669.96

E. E.

(Signed) CHARLES BUTLER,
(Signed) W. H. GOODMAN,
Executors of H. Anderson, Deceased."

$1,669.96. New York, Sept. 27, 1852.

Received of Charles Butler, sixteen hundred sixty-nine 96-100 dollars on his note to H. Anderson, this 1 Oct., 1852.

(Signed) W. H. GOODMAN,
Executors of H. Anderson, Deceased."

2.

A note and endorsement thereon as follows:

"7,340 dols. New York, Oct. 1, 1853.

For value received, I promise to pay to the order of W. Goodman and P. Anderson, trustees and executors of the estate of Henry Anderson, deceased, seven thousand, three hundred and forty dollars, with interest on or before the first of December next, and the payment of $7,340 as of 1 Oct., 1853, to be endorsed on my note due the estate of H. Anderson.

(Signed) CHARLES BUTLER,
By S. H. Fleetwood, his Attorney."

Endorsed as follows: "Pay.....

(Signed) WALTER GOODMAN,

(Signed) P. ANDERSON,

Executors and Trustees of the Estate of H. Anderson."

3.

It was expressly admitted (Tr., 528) that Butler, in addition to the payments evidenced by the foregoing written instruments, made the following other payments to the executors, which were included in their reports to the Probate Court of Marshall County, Mississippi, viz.:

May 4, 1855, Cash, 9th report.....$3,000.00
October 30, 1855, Cash, 10th report..$4,340.00
October 30, 1855, Cash, 10th report....$1,027.60
(Tr., 528.)

It will be noticed that the foregoing payments were made by Butler to Anderson's executors and trustees within the

life of the trust, and that it nowhere appears that Butler ever received any allowance or credit whatsoever for his valuable Toledo property.

At page 105 of this brief we present computations which we believe conclusively show that these payments satisfied Butler's indebtedness in full with interest.

For convenience, it is here further noted that after October, 1855, Butler paid to the executors and James H. Anderson in cash:

The above note (Tr. 528)	$7,340.00	
And 7% interest thereon	3,793.19	
Amounting to		$11,133.19
As follows:		
Jan. 1, 1857 (Tr. 571)	4,000.00	
May 7, 1860 (Tr. 571)	2,041.00	
Aug. 9, 1860 (Tr. 571)	500.00	
Feb. 1, 1861 (Tr. 571)	2,419.49	
March 8, 1861 (Tr. 571)	2,172.70	
Total		$11,133.19

Each and all of said payments are admitted by stipulation or proved by undisputed written evidence (Tr. 571).

Some time in October, 1855, Peter Anderson and Walter Goodman, two of the executors and trustees under the will of Henry Anderson, deceased, duly executed a deed conveying to Charles Butler all of the real estate described in the Bissell mortgage, including all of the premises in controversy in this action, and shortly after the making of this deed, it was placed by the executors and trustees in the hands of Mr. Halstead, then the president of the Bank of the Manhattan Company, in New York City, with instructions, it is submitted, to deliver same to Charles Butler upon the pay-

ment by him of the balance due upon his note for $20,000 above described. Mr. Halstead died some years ago (Tr. 550).

3. Events After June 25, 1856, When James H. Anderson Became 25 Years of Age to Beginning of This Action.

Thereafter and sometime prior to May 1, 1860 (Tr., 556) the executors and trustees made a settlement of their trust with James H. Anderson, the only surviving son and heir of Henry Anderson, and turned over to him all of the estate in their hands belonging to him; and unquestionably also assigned and delivered to him the note dated October 1, 1853, for $7,340 above mentioned. In any event we submit they directed Mr. Halstead and the Bank of the Manhattan Company to turn over to James H. Anderson any payments which might thereafter be made to the bank by Butler upon his note, and any payments thereafter made by Butler were turned over to James H. Anderson (Tr. 550).

Upon the last trial in the circuit court, Anderson also produced from the custodian of the papers of the estate of Charles Butler, deceased, and offered in evidence copies of two letters, one being a letter from Mr. Butler to James H. Anderson, dated July 28, 1858 (Tr. 567), wherein Mr. Butler expresses the hope of being able to dispose of a part of his property so as to provide for payment to James H. Anderson of the balance due him, and among other things, therein says:

> "There are about $2,000 of taxes and assessments against the property, overdue since last fall, which it has been utterly out of my power to provide for. There was no way under the sun that I could command the means. . . . If it should meet your views to take the property at a *bona fide* valuation in payment of the debt it would be a great relief to me, and from such valuation would make a liberal deduction. I have struggled to hold on to this property for

many years in the hope of realizing from it some part of the large sum it has cost me, and for the first time in many years it looks to me as the time is approaching when it would be in demand at prices that would pay off the incumbrance and yield a handsome surplus. . . . I have explained all this to Mr. Goodman, who is now here. I regret most sincerely the turn things have taken with me within the last year and most of all because it interfered with and defeated the provision and arrangements which I had made for the payment of this debt in full prior to the 1st January last. But the catastrophe which happened and which put all in the world I had in jeopardy was not foreseen, and could not be prevented."

The other of said letters (Tr. 560) is as follows:

"No. 12 Wall street,
New York, 10th March, 1860.

"W. GOODMAN, ESQ., Holly Springs, Miss.

"My dear sir: I have just been to the Manhattan Bank to see if I could find the deed deposited there by you on the 9th October, 1855, of the Toledo property and found it all safe. It was left with Mr. Allaire, the first teller, and the envelope has the endorsement 'The property of Walter Goodman, Peter Anderson, and to be delivered on the order of either of them.' My contract with Mr. Bronson for the sale of the property is very stringent and requires me to make a title to the property with certificate of Mr. Waite that the title is free and clear and valid and to have the deed, with the certificate of title, at Toledo by the first of May. I am apprehensive that Mr. Bronson will avail of any possible chance of backing out from his contract with me. He is a perfectly responsible man, and once bound will pay for the property punctually according to his agreement, and hence it is of the first importance to me to be ready in ample time, to meet any difficulty which he may interpose. My agent, Mr. Berdan, has just been here and he has been overhauling all back taxes and I see nothing in the way of a clean title on receiving the deed from you. On the record the title is in Henry Anderson. The deed from the trustees and executors of Henry Anderson to me, and my warranty deed to Mr. Bronson, makes a perfect chain going back more than twenty-two

years, possession has been held during all that time by me, and the taxes have been paid by me. I shall want your order on Mr. C. O. Halstead, Prest. of the Manhattan Bank, for delivery of the package containing the deed to me and if you will please direct him to open it, and to hand the deed itself to me, and take from me a receipt for it and my stipulation to return in place of it the cash payment of $2,000, to be paid by Mr. Bronson on delivery of deed, as soon as received, and also to deliver the bond and mortgage to Mr. Bronson for $15,500 for the balance of purchase to him to take the place of the deed. You will see and appreciate the importance of placing me in a position to send forward the title papers to Mr. Waite at Toledo at the earliest possible moment, that he may be fully prepared to deliver the deed with the evidence of title before the first of May, and may anticipate and be prepared to obviate any exceptions which Mr. Bronson may be prompted to take to the title.

"I have no doubt he will be very glad to avail of the slightest pretext to get rid of the contract. I will have the business done with perfect security to you, and trust that you will give to it your immediate attention.

"In haste, truly yours,

(Signed) CHARLES BUTLER."

It is of interest to note that the Mr. Waite referred to in the foregoing letter was afterward appointed Chief Justice of the Honorable the Supreme Court of the United States.

We respectfully submit that it fairly appears that by direction of James H. Anderson, or of the executors and trustees, the deed of the latter was delivered by Mr. Halstead, or by the bank, to Charles Butler some time prior to and was recorded May 2, 1860, in the office of the recorder of Lucas county, Ohio (Tr. 528, 531).

April 16, 1860, the other executor and trustee of the estate of Henry Anderson, deceased, also executed a deed conveying to Charles Butler all of the property described in the Bissell mortgagt. This was delivered to Mr. Butler May 1, 1860, and was at once recorded in the office of the recorder of Lucas county, Ohio (Tr. 531, 534).

The above deeds are substantially the same, and in addition to conveying the title to Butler, recite that the premises therein described were held by Henry Anderson in his lifetime as a mortgage to secure a certain sum of money due from Charles Butler to Henry Anderson. (Tr. 530).

April 7, 1860, James H. Anderson and wife duly executed a quit claim deed conveying to Charles Butler all the property described in the Bissell mortgage. Recorded May 2, 1860. (Tr. 522, 523).

March 27, 1860, the city clerk of Toledo, Ohio, duly executed and delivered to Charles Butler eight tax deeds together describing all the property in controversy herein. These deeds each acknowledged the payment of certain delinquent assessments against said premises, and were each duly recorded April 2, 1860. (Tr. 534-549).

April 23, 1860, Charles Butler in consideration of $17,500 then paid, by warranty deed sold and conveyed to Calvin Bronson, since deceased, grandfather of Messinger, under whom he claims, all of the premises in controversy in the case at bar, which deed was shortly thereafter delivered to Mr. Bronson, who at once recorded same and entered into possession and made valuable improvements on said premises, as Messinger has also done.(Tr. 524-526).

Nearly forty-five years afterward, December 27, 1904, *Anderson vs. Messinger* was commenced in the federal circuit court.

The matters in estoppel and bar pleaded by petitioner in his amended and supplemental pleadings herein, were each and all duly sustained by certified transcript of the record in *Anderson vs. The United Realty Co., Messinger, et al.*, (Tr. 322) and, by certified transcript of the record in the common pleas and circuit courts in the consolidated suits of *United States Mortgage & Trust Co. vs. Anderson, Messinger, et al.* (Tr., 400, 445, 515.)

The substance of the pleadings, judgment, findings and decree, respectively, in these suits, evidenced by the record in each of them, is stated at pages 3, 4-8 of this brief.

4. Statements Concerning Property Involved in Actions in Federal and State Courts.

The plat on the opposite page shows the premises described in *Anderson vs. Messinger* in the federal circuit court, and part of the premises involved in the suits in the state courts described in Messinger's amended and supplemental pleadings (Tr. 266, 268-286, 293-297).

The property involved in *Anderson vs. Messinger* in the federal circuit court is shown on plat in red and in red and blue.

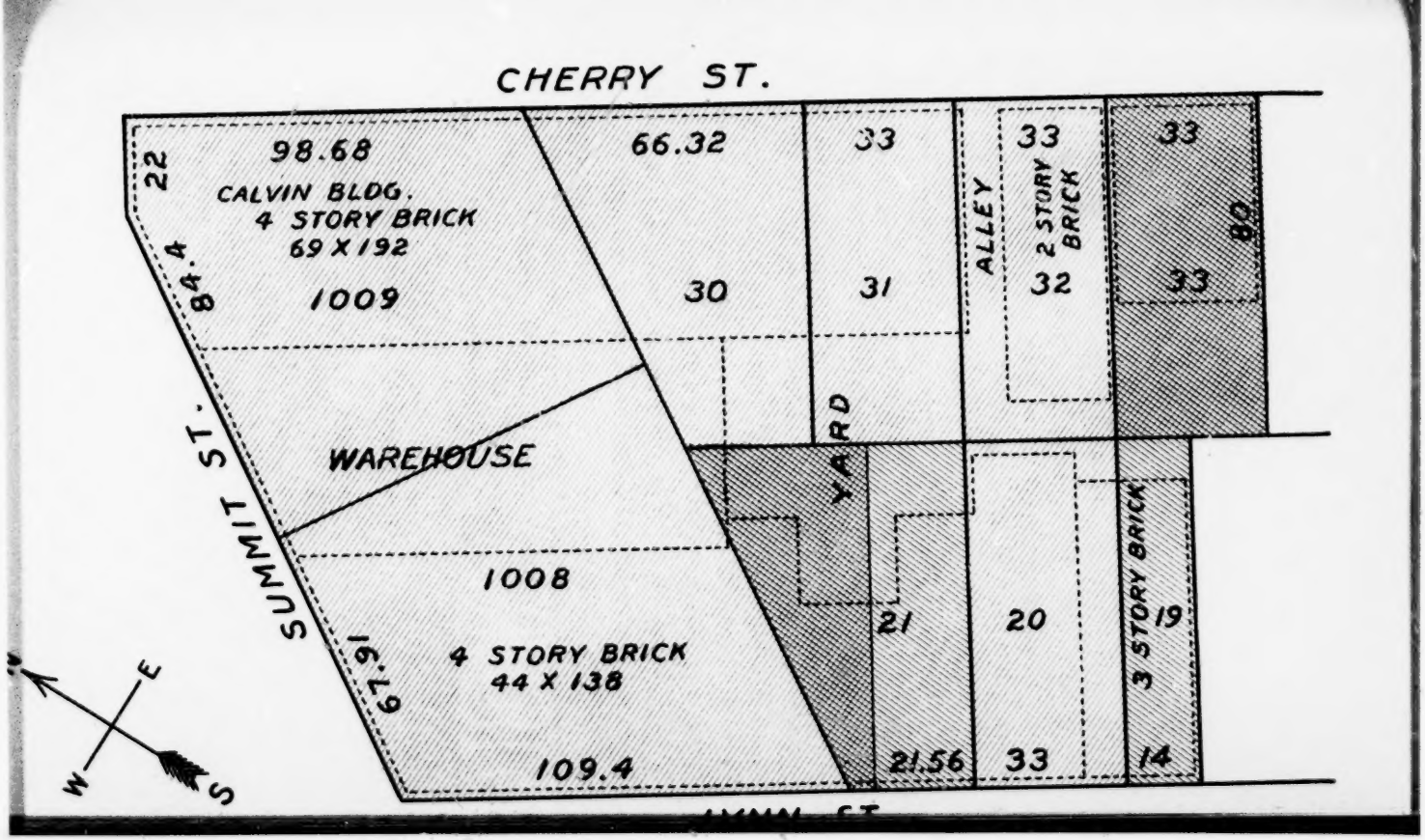
The property involved in *Anderson vs The United Realty Co., Messinger et al.* in the state courts, claimed therein by Messinger, is shown in blue, except triangular portion of lot 21 and all of lot 33 shown in red and blue. This triangular portion of lot 21 and lot 33 are described in the petition in said case, and we think are involved therein.

A great deal of other valuable improved property was involved in *Anderson vs. The United Realty Co., Messinger et al.*, comprising part of lot 19 shown on the plat and premises adjoining lots 19 and 33 and extending southeasterly therefrom to Water street; also valuable improved property extending from the easterly boundary line of Water street to the thread of the channel of the Maumee river.

The entire property shown on plat, except lot 33, is involved in the foreclosure suits in the state courts described in Messinger's amended and supplemental pleadings in *Anderson vs. Messinger*. (Tr., 268-286, 293-297.)

Lot lines are shown in black, and outlines of buildings are indicated by dotted lines in black.

The premises involved in the two actions comprise more than an entire square of improved property in the central part of the city of Toledo, of the aggregate value of about half a million dollars.


CHERRY ST.
98.68
66.32
33
33
33
22
CALVIN BLDG.
4 STORY BRICK
69 X 192
ALLEY
2 STORY BRICK
80
84.4
1009
30
31
32
33
SUMMIT ST.
WAREHOUSE
YARD
1008
3 STORY BRICK
21
20
19
4 STORY BRICK
44 X 138
67.91
109.4
21.56
33
14
E
W
S

IV.

ASSIGNMENT OF ERRORS.

In addition to other errors hereinafter specified, the following assignment of errors, duly assigned by petitioner in the circuit court herein, and presented to the circuit court of appeals upon the last hearing of this case (Tr. 586), are now severally assigned here and relied upon by petitioner as grounds for the reversal by this Honorable Court of the several judgments of the circuit court of appeals, and of the last judgment of the circuit court for the northern district of Ohio, western division.

For convenience of reference, the title and formal parts used below are retained here with numbering in parentheses.

Where the principal ground of objection and exception relied upon below was estoppel by former adjudications, we have not reprinted here the substance of the evidence all fully set out in the several assignments of error appearing in the record at the pages, respectively, referred to herein, not thereby intending, however, to waive or relinquish, but insisting upon such errors.

In the Circuit Court of the United States, for the Northern District of Ohio, Western Division.

No. 1897.

PETER ANDERSON,

Plaintiff.

vs.

ROSEWELL E. MESSINGER,

Defendant.

AT LAW.

ASSIGNMENT OF ERRORS.

Rosewell E. Messinger, the defendant in this action (petitioner here), in connection with his petition for a writ of error (Tr., 604), makes the following assignment of errors which he avers occurred upon the trial of said cause, to-wit (Tr., 586):

I.

(III.) The court erred in the admission of evidence offered upon said trial by the plaintiff below (respondent here) duly objected and excepted to by petitioner, in the following instances, to-wit:

(1.) In receiving in evidence Section 1 of stipulation No. 1 herein (Tr., 308), the substance thereof, relating to Bissell's title to the premises in controversy.

Petitioner, the defendant below, duly objected and excepted to this evidence on the ground that all matters in controversy herein had been finally adjudicated and determined by the findings, judgments and decrees, respectively, in the state courts, described in the pleadings filed by defendant, and that respondent was thereby estopped and barred from asserting or maintaining his alleged causes of action herein, or either of them (Tr., 308.)

Petitioner duly, separately and severally, objected and excepted on tht same ground to all the evidence offered by respondent upon the last trial herein.

(2.) In receiving in evidence Section 2 of stipulation No. 1 herein (Tr., 308-309), the substance thereof being that on May 19, 1838, said Edward Bissell and wife duly executed and delivered a mortgage in due form of law of said date to Charles Butler, upon the real estate the title to which is in controversy herein, to secure the payment of a certain bond of said Edward Bissell to said Charles Butler, executed on the same date for $21,500.00, payable at the office of the Manhattan Company of the City of New York within one year from the date of said mortgage, with interest at the rate of seven per cent. per annum; that said mortgage was duly filed for record May 19, 1838, and was duly recorded in the records of mortgages of Lucas County, Ohio; that on September 23, 1841, said Charles Butler made an assignment of said mortgage to Henry Anderson in the following words and figures, viz:

"Assignment: I hereby assign this mortgage to Henry Anderson on certain trusts set forth in a deed this day made.

September 23, 1841.

"CHARLES BUTLER."

Which assignment was duly recorded on the margin of the record of said mortgage, in Lucas County, Ohio, on September 30, 1843.

(3.) In receiving in evidence Section 3 of stipulation No. 1 herein (Tr., 309-312), the substance thereof being that on September 19, 1843, said Henry Anderson, assignee of said Bissell-Butler mortgage, filed his bill in chancery in the Common Pleas Court of Lucas County, Ohio, to foreclose said mortgage, said Henry Anderson being complainant in said action, and Edward Bissell and others being defendants therein; that said bill alleged the execution of said Bissell bond and mortgage and the non-payment thereof but made no allegations against Charles Butler except to allege the assignment of said mortgage by said Charles Butler to said Henry Anderson, and prayed that writ of subpoena might issue against the defendants in said action, that an accounting might be had, and the defendants be forever barred and foreclosed from all right and equity of, in and to said mortgaged premises, and for other equitable relief; that all the defendants in said action except Charles Butler were either duly served with subpoena or entered their appearance in said action; that said Charles Butler was not served with subpoena or other process, and in no manner entered his appearance in said action, and said court in said action in no manner acquired jurisdiction over said Charles Butler; that on April 1, 1844, a decree was entered in said action, ordering said premises advertised and sold according to law for the payment of $29,139.01, found due complainant, Henry Anderson, on said bond and mortgage from the defendant, Edward Bissell; that a master commissioner was appointed to sell said mortgaged premises, and afterward sold same, including the real estate involved in this action to said complainant, Henry Anderson, at the price of $6,921.00, which sale was confirmed by the court, and the commissioner was ordered to convey said real estate in fee simple to said purchaser, Henry Anderson, his heirs and assigns forever; that on November 18, 1844, said master commissioner executed his deed to said Henry Anderson, conveying said premises to him, which deed was thereafter duly

recorded in the office of the recorder of deeds of Lucas County, Ohio; and that all the proceedings in said foreclosure suit were regular and legal, excepting the failure or omission to serve Charles Butler with subpoena, or in some manner acquire jurisdiction as to him.

(4.) In receiving in evidence Section 4 of stipulation No. 1 herein (Tr., 312-317), the substance thereof being that Henry Anderson at the time of his death, was a resident of Holly Springs, Marshall County, Miss., and executed his last will and testament February 28, 1846; that on April 3, 1846, said Henry Anderson died, after which his said last will and testament was duly probated and recorded in and by the Probate Court of Marshall County, Miss., a court of competent jurisdiction; that afterward a duly authenticated copy of said last will and testament, with the proceedings admitting it to probate and record, taken from the records of said Probate Court of Marshall County, Miss., was filed in the Probate Court of Lucas County, Ohio, and by it was duly admitted to probate and record as a will from another state, and then and thereby became and now is the last will and testament of said Henry Anderson, deceased, and is in full force and effect; a true, full and correct copy of said will being as follows:

"I, Henry Anderson, do make and ordain this to be my last will and testament. I declare my domicile to be the town of Holly Springs, Marshall County, State of Mississippi. I revoke the will made by me on the 3rd of March, 1837, and all other wills, if any there be.

"Item. I give, devise and bequeath to Peter Anderson, Walter Goodman and Peter W. Lucas all my property, both real and personal, legal and equitable in possession, reversion or remainder, and all claims and demands whatsoever, except such right, title or claim to land, money or choses in action as I may be entitled to as one of the agents of the American Land Company and as one of the stockholders of said company; this property they shall hold in trust and if one or more of them die, the survivors or survivor shall hold in trust for the following purposes; they shall pay my debts, other than

such as may be owing to the American Land Company, out of the moneys on hand and such property as may be sold least injurious to my estate. I wish them to collect debts due to me, and apply to this purpose. They may, if they think fit, and can, obtain an extension of time on any debt, and they may pledge my property to raise money to pay debts. They may sell for cash or on credit, and if at any time, they have funds on hand not required for debts or legacies they may invest the same. They shall have full power to make titles for property sold and to pay charges for preservation and in all respects have the power of owners but always as trustees; I have entire confidence in each of them and therefore I give each the power of all, so that each may do separately what all acting together may do, except in making investments; in that I wish all to join. The annual accounts of my said trustees signed by their respective names shall be binding on my heirs and shall be conclusively so unless error or fraud be clearly established. I have directed the payment of debts, other than what I may owe the American Land Company. I exclude the debts to the company, because that is subject to an account with the company and I do not wish my trustees to make payments before that account is adjusted. The adjustment of that account and the direction and management of the affairs of the company so far as I have power, right or interest, I place in the hands of Peter Anderson and Walter Goodman and when they have finally closed it, it shall become a part of the trust created by this article of my will and subject to the control of my said trustees. By saying 'it shall become a part of the trust' I mean the effects and proceeds that I may be entitled to as stockholder and agent of the company.

"Item. As agent of the American Land Company jointly with my brother I am entitled to an account with the trustee, and it is my will that this claim for an account, and all rights, claims and powers growing out of any contract or contracts with the trustees do vest in Peter Anderson and Walter Goodman as I have before said. They shall have power to settle with the trustees immediately or at such time as

they may think best, and they shall be entitled to receive conveyances of land, should a division of land take place, and should the notes of company be divided, they shall be entitled to receive the same. The lands they may receive shall be taken to them as trustees of this my will. They shall have power to execute all papers necessary for a settlement of the agency and all papers executed by them shall be binding on my heirs. When this business is finally closed, I direct that they make out and sign a schedule of the property received on account of said interest and an account explanatory of the settlement, and the same shall be taken as a proper inventory and the property therein contained shall thereafter become vested in my trustee created by the first clause of my will, but if there be real estate therein contained, and the same stand in their name, as trustees, that is in the name of Peter Anderson and Walter Goodman as above stated, a title from them shall be good and sufficient to a purchaser. My intention being that this interest shall only come under the administration of the trustees first created and my executors hereinafter named from and after the time such interest is ascertained by a final close with the company. I have acted as agent for the trustees of the American Land Company in respect to the lands of the company in the state of Arkansas and elsewhere. What may be due me for such services is a claim that I desire to go to said Peter and Walter and not to my trustees first named. It forms a portion of my claims against the company which I wish settled on the final settlement with them. I suppose that I have made myself fully understood, but for greater certainty I repeat that my wish is that nothing be taken from the company interest for debts or legacies unless for such debts as are connected with the company. At the same time if my other property cannot pay my debts or can not pay them without injury, and it be found that it would not be unjust to withdraw funds from the company interest, then it may be done, not otherwise. When my interest in the company is finally ascertained it shall, as I have said become a part of the trust first created, and the said Peter W. Lucas shall

indorse his acceptance of the schedule of the two trustees who have signed it. I give to each, that is to Peter Anderson and Walter Goodman, severally the same powers that both are invested with. In both of the trusts created by this will my trustees shall not be required to give security, nor shall they be liable for each other and their accounts signed by them respectively shall be evidence binding on my heirs of the correctness unless error or fraud be clearly shown.

"Item. It is my will that when my son William arrives at the age of twenty-one years the trustees of the first and general trust shall deliver to him a settlement, if the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one-half of my property, reserving thereout two-fifths parts of said moiety, by valuation on which my said trustees shall hold in trust and properly invest and pay over to him at the age of twenty-five years. If my interest in the American Land Company be not brought into the general trust at the time William becomes twenty-one, but is brought in any time before he arrives at twenty-five, so soon as brought in, two-fifths shall be deducted therefrom and invested and paid over to him at twenty-five, the other three-fifths he shall have as soon as paid in. I find the above does not express my will in this: when I say two-fifths shall be deducted from the interest I may have in the Land Company for investment and three-fifths to be paid to him, I mean two-fifths of a moiety shall be deducted and three-fifths of a moiety paid over.

"It is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son, James at the respective period of twenty-one and twenty-five years of age being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the regulations laid down concerning the same.

"If either of my sons die without lineal descendants the one surviving shall take his estate above

bequeathed, and if the survivor die without lineal descendants then one-half both of the decedents original portion as well as one-half of the portion taken by survivorship shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother, Peter, be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving then the share shall go to my other brothers and sisters surviving at the time of such decease of my son. I make the following explanations: The limitations over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years respectively. The above limitations over shall give way to the provision of such wills.

"Item. I entered into a contract with the American Land Company, to warrantee title to such lands of the company as might be sold, and it so is that many bonds are now out binding me to such warrantees. I give to Peter Anderson and Walter Goodman or either of them the power to execute deeds to carry out such warrantees, and I declare that the name of either with the seal of either to such deeds shall bind my heirs, executors and administrators. It is also the case that I hold lands in common with Daniel Saffarans. It is important that these lands be sold as purchasers may offer. My undivided half interest has already by this my will been devised to my general trustees. I declare that they or either of them shall have power to convey with warrantee. This power I presume they have by the first clause of my will, which vests the title in them. I only mention it here for greater certainty.

"Item. If my brother Peter, desires to keep up a household in this place, I bequeath to him the use

of my house, out houses, stables, lots, household furniture, books, horses, carriages and whatever belongs to the household establishment, and also all my slaves or such of them as he may desire to have. I do not require that any inventory or appraisement of them be made, but on the breaking up of such household, he shall make out an inventory of such as remain unconsumed by use, and my other two trustees shall endorse an acceptance thereof after which time the property in such inventory shall go into the general trust and be subject to all the regulations therein laid down.

"Item. I give to my niece Caroline, daughter of my brother William, one thousand dollars, payable after my debts are satisfied. I direct my executors to pay her sixty dollars per annum as interest thereon from the time of my death until paid.

"Item. I give to my niece Rucellea, daughter of my brother Robert, two thousand dollars payable after my debts are satisfied and I direct my executors to pay her one hundred dollars as interest thereon from my death until paid.

"I have directed that a portion of my property shall be placed in the hands of my sons on their arriving at twenty-one, and I have directed that my trustees shall have the power to procure extension of my debts, and I have made the payment to my sons dependent on the payment of my debts Now on reconsideration it occurs to me that it may so happen that there will be outstanding accounts at the time my sons arrive at twenty-one, and yet it might be in no wise injurious or improper to place my sons in possession of a part of what may be coming to them. My trustees are, therefore, authorized, if they think fit, to let them have a portion of what is coming to them at twenty-one even though some debts may remain unpaid. The amount of such portion shall be according to the discretion of my trustees. It shall not exceed the amount that is limited to them on the payment of debts, nor ought it to be an amount that would jeopardize their payment.

"Remark. If the payment of the interest on the legacies jeopardize the payment of debts, the payment of such interest must cease without prejudice how-

ever to the right of the legatees to have the interest at the time they may be entitled to the principal. I further say that if the bequests to my brother Peter of the use of my household and slaves be found inconveniently to impair the capacity of the executors or trustees to pay debts, the use shall cease and no rights shall arise to him by such lapse or ceasing of the bequest.

"I give to my son William my diamond ring. I give to my son James the watch which my son William wears, which belonged to his mother.

"I appoint my brother Peter to be guardian of my sons and I direct that no security be required of him.

"I appoint by brother Peter and Walter Goodman and Peter W. Lucas to be the executors of this, my will, and direct that no security be required of either of them.

"In testimony that this is my will, I have hereto affixed my seal and have subscribed my name and written my name in the margin this 28th day of February, 1846.

(Seal.) Henry Anderson.

"We, the undersigned, attest that Henry Anderson signed and sealed this instrument in our presence and declared it to be his last will and we have subscribed the same in his presence and in the presence of each other.

Z. M. Phelps.
H. M. Lusher.
Isaac Saffarans."

In receiving in evidence:

(5.) Sec. 5 of stipulation No. 1 herein (Tr., 317).

(6.) Sec. 6 of stipulation No. 1 herein (Tr., 317).

(7.) Sec. 7 of stipulation No. 1 herein (Tr., 318).

(8.) Sec. 8 of stipulation No. 1 herein (Tr., 318-319).

(9.) Stipulation No. 5 herein (Tr., 319-320).

(10.) Sec. 8 of stipulation No. 3 here (Tr., 320-321).

(11.) Statement furnished by the defendant concerning receipts and disbursements from property. (Tr., 321.)

Petitioner duly, separately and severally objected and excepted to each and every part of the foregoing evidence because barred by former adjudications.

II.

(IV.) The court erred in excluding and rejecting evidence offered below by the defendant (petitioner here) upon said trial duly excepted to, in the following instances, to-wit:

1. In excluding and rejecting duly certified copies of eight duly executed and recorded deeds (Tr., 534-549), from the city clerk of Toledo, Ohio, to Charles Butler, dated March 26, 1860, said deeds reciting and evidencing in substance that the treasurer of said city on December 27, 1847, according to the provisions of the charter and ordinances of said city, in such case made and provided, sold to the persons below named the several lots described in the Vistula Division of Toledo, Ohio, for the sums below set opposite said lots, and charged thereon for the Vistula grade tax, viz:

(1)	To Charles M. Dorr, Lot No. 20.....	$ 66.54
(2)	Charles W. Hill, Lot No. 30.....	99.86
(3)	Charles M. Dorr, Lot No. 31.....	76.56
(4)	Charles M. Dorr, Lot No. 32.....	76.56
(5)	Charles M. Dorr, Lot No. 33.....	76.56
(6)	Charles M. Dorr, Lot No. 1008....	166.42
(7)	Charles M. Dorr, Lot No. 1009....	199.70
(8)	T. H. Hough, Lot No. 1008½ (21)	46.60
		$808.80

That said several sums were forthwith paid by said respective purchasers to said treasurer; that more than two years had elapsed from the date of said sale; and said premises not having been redeemed, and the certificate of said sale to said several purchasers having been assigned and transferred to said Charles Butler, and having been produced to said city clerk of the city of Toledo, with the endorsement of said city treasurer thereon; that no money had been deposited with him for the redemption thereof; that, in consideration of the premises and on request of said Charles Butler, said Patrick J. Monahan, clerk of the city of Toledo, granted and assigned to Charles Butler, his heirs and assigns forever, said above described premises, to have and to hold same to the proper use of said Charles Butler, his heirs and assigns forever.

III.

(V.) The court erred in the admission of evidence offered upon said trial by the plaintiff below (respondent here) in rebuttal, duly objected and excepted to, in the following instances, to-wit:

(1.) In receiving in evidence a certain letter (Tr., 550-551), from Charles Butler to Walter Goodman, dated at New York, March 2, 1860, the substance thereof being that Mr. Bronson, who was negotiating with Charles Butler for the Toledo property, had come to New York and wanted to negotiate for the entire block instead of part of it; that the bargain being concluded for the whole block at $17,500.00, that Bronson did not agree to pay any money until Butler was prepared to give him a good deed, with certificate of title; that Butler enclosed a copy of the agreement between him and Bronson, that Goodman might understand perfectly the great importance to Butler of having the deed then lying in the Manhattan bank in escrow delivered to Butler in order that he might make a proper deed of warranty to Mr. Bronson as early as practicable and avoid possible excuse for his backing out; that Butler also handed Goodman copy of account as finally settled October 1, 1854, by Goodman and Mr. Anderson, and which said parties and Butler had before them October 1, 1855, when Goodman and Anderson were at New York, and at which date they executed the deed and lodged it in escrow with W. C. Halstead of the Manhattan bank, to be delivered to Butler on the order of either of them:

That since then the only payment made was of $4,000.00 to Peter Anderson January 1, 1857, of which Goodman has a statement, and for which Butler holds paid draft; that by the terms of agreement made in 1852, with James, after he became of age, Butler was to pay six per cent. interest; that in the fall of 1855, when final adjustment was had in New York, Butler agreed to pay seven per cent. after that date and so computed the amount, making $9,183.88 on January 1st, last; that if Goodman would give Butler an order on Mr. Halstead for the deed, Butler would lodge with him a stipulation to pay over the money to be received from Mr. Bronson on May 1st (the $2,000.00 and interest thereon

from December 26th, last), and would also place with him the bond and mortgage or notes and mortgage which he was to take from Mr. Bronson for $15,000.00, duly assigned by Butler to James H. Anderson as collateral security for the payment of the balance due from Butler; that Butler wanted to place the papers at the earliest date practicable in the hands of the lawyer, M. R. Waite, Esq., of Toledo, whose certificate of title Butler was bound to furnish to Mr. Bronson; that there was to be no transfer of title until the whole thing is consummated.

(2.) In receiving in evidence a certain letter from Charles Butler to Walter Goodman dated in New York February 25, 1860 (Tr., 551-552), the substance thereof being that said Butler enclosed in said letter copy of a letter to James H. Anderson relative to sale of Butler's Toledo property, accomplished after a great deal of negotiation, to responsible purchaser, who intended to proceed immediately on obtaining his title to improve the property and to erect extensive buildings; and that said purchaser held Butler's contract to make a good title on or before May 1st, when he was to pay $2,000.00 and interest, another payment to be made July 20, of $465.00 and on January 20th following, $2,465, Butler to take purchaser's bond and mortgage for balance of $15,500.00 on the 1st of May, which bond and mortgage Butler stated he would assign and deposit with C. O. Halstead in Manhattan bank; that the deed to Butler was in Mr. Halstead's hands in escrow, deposited by Walter Goodman some years ago; that Butler would have to have this delivered to him to enable him to make warranty deed to Mr. Bronson, and requesting co-operation to enable Butler to promptly close with Bronson; that Bronson would pay the money as soon as he could get the title on receiving fifteen days' notice; that Butler would despair of finding another purchaser at so good a price in ten years again, if this should fail him; that the amount of principal and interest due from him is a little over $9,000.00; that the amount of said sale was $17,500.00; that the cash payment would be immediately paid James and the bond and mortgage assigned, requesting prompt action and desiring to place the papers in the hands of Butler's counsel, M. R. Waite, Esq., to be delivered and put

on record simultaneously with the payment of the $2,000.00 and the execution and delivery of the bond and mortgage by Mr. Bronson.

(3.) In receiving in evidence a certain contract (Tr., 552-554), between Henry Anderson and Charles Butler, dated October 4, 1844, the substance thereof being the following recitals:

That Butler had assigned the Bissell bond and mortgage to Anderson as collateral security for the payment of $20,000.00 note theretofore given by Butler to Anderson;

That proceedings in relation to the Bissell bond had been taken by Anderson, and that an order for sale of the mortgaged premises had been made and confirmed;

That a decree or judgment for deficiency might be obtained in favor of Anderson against Bissell;

That Butler as further collateral security for the payment of his $20,000.00 note in favor of Anderson, had also assigned to Anderson certain shares of railroad stock of the par value of $27,300.00;

That Anderson, at the request of Butler and in consideration of the covenant of Butler in said agreement contained, was willing to relinquish and surrender to Butler the collateral securities so assigned as aforesaid for the payment of said note of $20,000.00, so far as same might be done without prejudice or injury to the order obtained for sale of said premises and the rights of Anderson under the same, and without prejudice to the personal liability of Butler to Anderson on the principal debt.

Said contract further providing in substance as follows:

In consideration of the premises and for the purpose of giving effect to the same, Anderson has at this date executed and delivered a power of attorney to Butler, authorizing him if he sees fit to do so, to release and discharge Bissell from all personal claims on said bond and mortgage, but without prejudice to the proceedings which have been or may be adopted to effect the sale of said mortgaged premises; and that Anderson has also, in writing, released and transferred to Butler the shares of railroad stock.

Butler, in consideration of the surrender and relinquishment of said securities, covenants and agrees

with Anderson that the same shall not be held or construed in any way to affect or impair the liability of Butler on said note for $20,000.00; and Butler also covenants and agrees with Anderson that he, Butler, will apply and pay over to Anderson on account of said note any money or other consideration which he, Butler, may receive or derive by reason of the surrender and relinquishment of the securities aforesaid by Anderson.

(4). In receiving in evidence: Sections 1, 2 and 6 of stipulation No. 2 herein, and Exhibit A thereof (Tr., 554-557), and stipulation No. 4 (Tr., 558-559), and the testimony of Oliver B. Snider, Esq. (Tr., 569), each duly, separately and severally objected and excepted to by petitioner because barred by former adjudications.

(5.) In receiving in evidence section 3 of stipulation No. 3 herein (Tr., 557-558), the substance thereof being that on May 7, 1860, Charles Butler wrote a letter to Walter Goodman, executor, stating that he was indebted to the estate of Henry Anderson, May 1, 1860, in the sum of $9,360.97.

(7.) In receiving in evidence a certain letter (Tr., 559-561), dated at New York, March 19, 1860, from Charles Butler to Walter Goodman, the substance thereof being that Butler had just been to the Manhattan Bank to see if he could find deed of the Toledo property deposited there by Goodman October 9, 1855, and found it all safe; that it was left with Mr. Allaire, the first teller that the envelope had the endorsement, "The property of Walter Goodman, Peter Anderson, and to be delivered on the order of either of them." Further that Butler's contract with Bronson for the sale of the property was very stringent and required Butler to make title to the property with certificate of Mr. Waite that the title is clear and free and valid, and to have the deed with the certificate of title at Toledo by the first of May; that Butler was apprehensive Bronson might back out, and that prompt attention was important; that on the record, the title was in Henry Anderson; that the deed of the executors and trustees of Henry Anderson to Butler and Butler's warranty deed to Bronson made a perfect chain going back more than twenty-two years; that possession had been held during all

that time by Butler, and that the taxes had been paid by him; that Butler desired Goodman's order on Mr. C. O. Halstead, president of the Manhattan Bank, for delivery of the package containing the deed to him, and requested Goodman to direct Halstead to open package and hand deed itself to Butler and take from him a receipt for deed and Butler's stipulation to return in place of it the cash payment of $2,000.00 to be paid by Bronson on delivery of deed, and also to deliver bond and mortgage of Bronson for $15,500.00 for the balance of purchase, and urging the importance of prompt attention.

(8.) In receiving in evidence Exhibit D of stipulation No. 1 herein (Tr., 561-564), same being a certain unrecorded contract between Charles Butler and William Anderson dated October 10, 1849, providing in substance that Henry Anderson held the title to the premises in controversy in this suit, acquired through foreclosure proceedings by deed from Edson Allen, master commissioner, in trust to secure an indebtedness evidenced by note of Charles Butler to Henry Anderson dated in July, 1841, for $20,000.00 and interest, said William Anderson declaring that his interest in said premises, as heir at law of said Henry Anderson, deceased, was held in trust as security for the payment of said note and for no other purpose whatever, and agreeing on the payment thereof to execute and deliver to said Charles Butler, his heirs or assigns, a full and complete release of his title in and to all or any part of said premises, said Butler agreeing on his part to pay said note to the executors of Henry Anderson, with interest as follows:

Oct. 10, 1849, $3,762.52, with all interest then due;
Oct. 1, 1850, $1,500.00, with all interest then due;
Oct. 1, 1851, $2,000.00, with all interest then due;
Oct. 1, 1852, $2,500.00, with all interest then due;
Oct. 1, 1853, $4,000.00, with all interest then due;
Oct. 1, 1854, $4,000.00, with all interest then due;
Oct. 1, 1855, $6,000.00, with all interest then due;

That Butler would also pay all taxes and assessments on said premises; and that the amount found due to Charles Butler from the estate of Henry Anderson, deceased, under contract for commissions for warranting title to lands sold for the American

Land Company should be applied toward the payment of said note.

(9.) In receiving in evidence Exhibit D2 of stipulation No. 1 herein (Tr., 564-567), same being a certain unrecorded contract between Charles Butler and James H. Anderson, dated September 16, 1851, and supplement thereto, said principal contract providing in substance that Henry Anderson held the title to the premises in controversy in this suit, acquired by foreclosure proceedings had in the common pleas court of Lucas county, Ohio, in trust as security for the payment of note given by said Butler to Henry Anderson, dated July 1, 1841, for $20,000.00, said James H. Anderson declaring that his interest is said premises as heir at law of said Henry Anderson, deceased, was held in trust to secure the payment of said note; that since the death of Henry Anderson, said Butler had made several payments of large sums of money on account of said debt to the estate of Henry Anderson; that said James H. Anderson, the only child and heir of said Henry Anderson was willing and desirous to execute a declaration, in writing, explanatory and declaratory of said facts in respect to said property, and to carry into effect the intention of his father, to the end that justice might be done and by said instrument acknowledged and declared that said premises and every part thereof, had been and were held as security for the payment of the balance due or to become due on said note from said Charles Butler, and for no other purpose or interest whatever; and that on the payment of said note and interest, said premises should and would be duly released and conveyed to Charles Butler, his heirs or assigns; and the said James H. Anderson did further by said agreement stipulate and covenant with said Butler, his heirs and assigns, that upon the request of said Butler, or his heirs and assigns, he would execute, acknowledge and deliver any other or further assurance in the premises, so that the lots of land aforesaid should be held subject to the payment of the principal and interest of the aforesaid debt, and for no other purpose; said supplement to said principal contract dated October 1, 1852, further providing that in consideration of the pay-

ment of said note of said Charles Butler to the executors of said Henry Anderson, as agreed in said principal contract, the time for the payment thereof was thereby extended as follows:

October 1, 1852, $2,500.00;
October 1, 1853, $4,000.00;
October 1, 1854, $4,000.00;
October 1, 1855, $4,000.00;
October 1, 1856, the balance;

And that interest at six per cent. on the whole sum should be paid annually on October 1, in each year, and that said agreement should be taken in connection with and supplemental to said principal contract dated September 16, 1851.

(10.) In receiving in evidence a certain letter (Tr., 567-569) dated at New York, July 28, 1858, from Charles Butler to J. H. Anderson, the substance thereof being statement that the only possible means Butler could command for the payment of the balance due James H. Anderson was in the property at Toledo, and that the object of his going to Toledo was to see if he could make any disposition of the whole or portions thereof for that purpose then or in a short time, and that he had been negotiating with a party for the sale of one-fourth part of the mortgaged property, and hoped to effect sale; that there was about $2,000.00 of taxes and assessments against the property overdue since the fall preceding, which Butler was unable to provide for; that he was financially embarrassed and could not then promise to make cash payments to Anderson and offered to turn over the property at a bona fide valuation in payment, and at a liberal deduction; that Butler had struggled to hold onto this property for many years in the hope of realizing some part of the large sum it had cost him, and that for the first time in many years it then looked to him as though it would be in demand at prices that would pay off the encumbrance and yield a handsome surplus; that some years ago, Butler agreed with the Bethel Seamen's Church Society to give them a lot out of this property for a church erection, that a handsome brick edifice had been erected and was now occupied, and they were entitled to a deed therefor; and that the erection of the church had added value to the property and relieved from some burden of taxes

IV.

(VI.) The said defendant, in the above entitled cause (petitioner here), further assigns errors in the trial and decision of said circuit court in said cause, each duly excepted to as follows:

(1.) Said court erred in sustaining the motion (Tr., 571-572), made by counsel for said plaintiff, Peter Anderson (respondent here), that the court should direct the jury to return a verdict in favor of said plaintiff, Peter Anderson, made upon the conclusion of the introduction of all the testimony introduced upon the trial of said cause.

(2.) Said court erred in charging and directing the jury to return a verdict for the plaintiff (Tr., 300-301).

(3.) Said court erred in not submitting to the jury for determination the issues joined in said cause between said parties thereto, together with the evidence thereon, offered and received by said court upon the trial of said cause (Tr., 300-301).

(VII.) Said court erred in denying and overruling defendant's motion (petitioner here) duly filed herein November 30, 1908, at the June, 1908, term of said court, for an order vacating and setting aside the order entered herein by this court under date of September 15, 1908, denying and overruling defendant's motion to vacate and set aside the judgment entered herein in favor of plaintiff June 2, 1908, at the present term of this court, and for an order vacating and setting aside said judgment in favor of plaintiff and granting defendant a new trial herein. (Tr., 575-576.)

Wherefore, the said Rosewell E. Messenger, defendant in said Circuit Court, and plaintiff in error in the Circuit Court of Appeals, prays that the judgment of said Circuit Court of the United States for the Northern District of Ohio, Western Division, in said cause, be reversed, and that said Circuit Court be directed to grant a new trial of said cause.

O. B. Snider, C. W. Everett,
King, Tracy, Chapman & Welles,
Attorneys for Defendant, Rosewell E. Messinger.

V.

Petitioner also respectfully presents to this court, and relies upon the following further assignments of error:

1. Error in the decision and judgment of the circuit court of appeals for the sixth circuit, rendered in case No. 1479, June 5, 1906, reversing the first judgment herein of the circuit court, and remanding this cause thereto for retrial and for costs, said decision and judgment of said circuit court of appeals not being sustained by sufficient evidence, and being contrary to law. (Tr. 68, 69) (146 Fed. 929.)

2. Error in the decision and judgment of the circuit court of appeals for the sixth circuit, rendered in case No. 1679, December 3, 1907, reversing the second judgment herein of the circuit court, and remanding this cause thereto for retrial and for costs, said decision and judgment of said circuit court of appeals not being sustained by sufficient evidence, and being contrary to law. (Tr. 253) (158 Fed. 250.)

3. Error in the decision and judgment of the circuit court of appeals for the sixth circuit, rendered in case No. 1916, June 8, 1909, affirming the last judgment herein of the circuit court, and for costs, said decision and judgment of said circuit court of appeals not being sustained by sufficient evidence, and being contrary to law. (Tr. 611) (171 Fed. 785.)

4. Error in the decision and judgment of the circuit court for the northern district of Ohio, western division, rendered at its June term, 1909, against petitioner, in case of *Anderson vs. Messinger*, designated in the circuit court of appeals as No. 1916, said decision and judgment in said circuit court not being sustained by sufficient evidence, and being contrary to law. (Tr. 300.)

RECAPITULATION.

1. Summary of Proceedings.

This is a writ of *certiorari* to review the proceedings and judgments in an action of ejectment brought by the respondent, Peter Anderson, against the petitioner, Rosewell E. Messinger, to recover the possession of certain property in Toledo, Ohio, and damages for the detention thereof.

There have been three trials in the circuit court and the case has been three times before the circuit court of appeals for the sixth circuit on proceedings in error.

The first trial in the circuit court was before Hon. Robert W. Tayler, a jury being waived, and resulted in a judgment in favor of Messinger. The circuit court of appeals reversed this judgment and remanded the case for a new trial. (146 Fed., 929.) (Transcript of Record, 68, 69.)

The second trial in the circuit court was before the Hon. Robert W. Tayler and a jury. In addition to the facts proved upon the first trial, Messinger offered in evidence certain proceedings by the city of Toledo, authorizing the making of an assessment for grading streets abutting on the premises in controversy, and certain deeds executed and delivered in pursuance thereof, under which he claimed title. Each party duly moved the court to direct a verdict. Anderson's motion was denied, and that of Messinger was granted, and the verdict was returned in his favor, and judgment was entered accordingly. (Tr., 114.) The circuit court of appeals also reversed this judgment, and again remanded the case for a new trial. (Tr., 253.) (158 Fed., 250.)

The third trial in the circuit court was had before Hon. Robert W. Tayler and a jury, but upon amended and supplemental answers duly filed by Messinger, setting forth three defenses, viz: (1) A general denial of Anderson's

claims. (2.) *Res judicata* and estoppel by reason of final judgment in *Anderson vs. The United Realty Co., Messinger, et al.*, rendered March 31, 1906, by the court of common pleas of Lucas County, Ohio; and (3) by reason of certain findings and decrees of the same court and upon appeal by the state circuit court in certain foreclosure suits, involving the same parties and property as are involved in the action under review. This trial resulted in a directed verdict in favor of respondent, on which judgment was thereafter entered. Upon writ of error sued out by Messinger this judgment was reviewed and affirmed by the circuit court of appeals. (Tr., 611.) (171 Fed., 785.)

2. Claims of the Parties Concerning Title.

Aside from the questions raised by Messinger's defenses of *res judicata* and estoppel, which we shall consider later, the claims of Anderson and Messinger to the premises, the title to which is in controversy herein, are founded upon the title of Edward Bissell, who is admitted to be the common source of title.

Butler was in possession and paid the taxes and assessments on the property from and after 1843, and until 1860, when he sold and conveyed it to Calvin Bronson, petitioner's grandfather, under whom petitioner claims.

Respondent claims title through the will of his grandfather, Henry Anderson, who acquired his title, if any, as the result of a proceeding in foreclosure in 1844, in the court of common pleas of Lucas county, Ohio, of a mortgage given by Edward Bissell to Charles Butler, assigned by him to Henry Anderson *in trust* to secure the payment of a note of Butler's held by Anderson. Butler was named as a defendant in this foreclosure proceeding, but was not served with subpoena or other process, did not enter an appearance and the court in no manner acquired jurisdiction over him therein. (Tr., 310.)

Henry Anderson became the purchaser of the mortgaged property at a sale made in this foreclosure proceeding, and the master commissioner executed and delivered a deed to him thereto. It is claimed by respondent that Butler's equity of redemption was released by an unrecorded agreement between him and Henry Anderson, dated October 4, 1844. This is denied by petitioner, who claims that by this contract the property was substituted for the mortgage, as security for the same debt, which was later paid in full; that after Henry Anderson's death in 1846 the title was duly conveyed to Butler by Anderson's trustees and executors, and also by his son, James, testator's only surviving heir; and, further, that as Calvin Bronson and petitioner each successively acquired his title for full value, and without any notice or knowledge of the contract of 1844, that it was not competent evidence to affect or destroy petitioner's title.

The title which Butler conveyed to Bronson was acquired by him from the following sources, and in the following manner:

1. Deed from Edward Bissell and wife.

2. Adverse possession by Charles Butler.

3. Deeds from the heirs of Henry Anderson, deceased.

4. Deeds from the executors and trustees of Henry Anderson, deceased.

5. By tax sales and tax deeds and adverse possession thereunder.

V.

BRIEF OF THE ARGUMENT.

Effect of Reversal and Remandment for Retrial Without Directing Final Judgment.

The first and second judgments of the circuit court of appeals in this case each reversed the preceding judgment of the circuit court, and in each instance remanded the case generally for further proceedings, without directing the entry of a judgment finally disposing of the case. (Tr., 68, 69, 253.) Therefore, until the last judgment of the circuit court, rendered June 2, 1908, (Tr., 300) no final judgment was rendered herein.

Smith vs. Adams, 130 U. S., 167-177.

This Honorable Court, upon its writ of *certiorari* herein has power to review each of the three judgments of the circuit court of appeals and the last judgment of the circuit court.

Panama Company vs. Napier, 166 U. S., 280-284.

Bierce vs. Waterhouse, 219 U. S., 320-331-2.

But since the record of the last trials in the circuit court and circuit court of appeals, respectively, includes the same issues and substantially all the evidence offered upon each of the former trials, and also includes and presents the additional issues, evidence and proceedings relating to the defenses of *res judicata* and estoppel, we shall first consider the questions presented by this record for review.

The Circuit Court of Appeals Erred in its Construction of the Anderson Will.

We respectfully submit, that Henry Anderson, by his will intended to give to his sons, or the survivor of them, an estate in fee simple, subject to defeasance, should they or the survivor of them die without issue, and that the circuit court of appeals erred in its construction of this will.

(All Assignments of Error, I to V inclusive. This brief, page 27.)

William Anderson died in 1850, in his twenty-second year, intestate, unmarried and without issue. He was survived by his brother James H. Anderson, who died December 16th, 1902, intestate, leaving surviving him, Peter Anderson, respondent herein, his only child and heir at law.

THE WILL.

Henry Anderson by his will (Tr., 312-316), gave all his property to three trustees in trust, conferring very ample powers upon the trustees, giving them the power of owners and to each the power of all; their accounts, in the absence of clearly established error or fraud, to be conclusively binding on his heirs, and further provided as follows:

> "It is my will that when my son William arrives at the age of twenty-one years, the trustees of the first and general trust *shall deliver* to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, *they shall put him in possession of* one-half of my *property*, reserving thereout two-fifths parts of said moiety, by valuation which my said trustees shall hold in trust and properly invest and *pay over to him at the age of twenty-five years*. If my interest in the American Land Company be not brought into the general trust at the time William becomes twenty-one * * * so soon as brought in, two-fifths shall be

deducted therefrom and invested *and paid over to him at twenty-five. The other three-fifths he shall have as soon as paid in.* * * * * * * * * * * * * * *

"It is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son, James, at the respective periods of twenty-one and twenty-five years of age being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the regulations laid down concerning the same."

In stating what his son William should have, the testator, referring to the bequest, used the following words and phrases:

(1) *"Shall deliver"*; (2) *"they shall put him in possession of one-half of my property"*; (3) *"they shall pay over to him at the age of twenty-five years"*; (4) *"paid over to him at twenty-five"*; (5) *"the other three-fifths he shall have as soon as paid in."*

The Century Dictionary, and other recognized authorities, define the word "have" as meaning "to hold, own or possess." Certainly this is the ordinary signification of the word, and we respectfully submit as used in the will in the fifth clause quoted "he shall have," could have meant nothing else than a devise to William in fee.

The word "property" used in the will in the devise to William Anderson shows an intention to devise a fee, and is sufficient to do so.

Carter vs. Gray, 58 N. J. Eq., 411.
Chamberlain vs. Owings, 30 Md., 447-455.
Piatt vs. Sinton, 37 O. S., 353.

If, however, there is room for argument as to what the testator intended by the use of the foregoing words and phrases, the provision in the will which follows the para-

graph in which they appear, shows clearly what the testator meant when he used them.

> "If either of my sons die without lineal descendants, the one surviving shall take *his estate above bequeathed.*"

The word "estate" in the devise to the surviving son, was declared by this court to be:

> *"The most general, significant and operative, that can be used in a will, and according to all the cases, may embrace every degree and species of interest—it carries a fee from its established and legal import and operation."*
>
> Lambert vs. Paine, 3 Cranch., 97-134.

Further it will be noticed that in the devise to James, which directly follows that to William, the testator provides that the trustees shall "hold and invest, and pay over the remaining moiety of my estate to my son James."

A moiety is defined by the Century Dictionary as one of two equal parts. By the preceding bequest William was given one-half of the property, and James was to have the remaining half, that is, the two sons were to have equal parts of the estate.

It is axiomatic that if the estate above bequeathed was simply a life estate, then there was nothing for the survivor to take, for the reason that a life estate would, of course, cease on the death of the life tenant. This, we respectfully submit, clearly shows that the construction given the will by the circuit court of appeals, does absolute violence to the clause next above quoted.

The complete paragraph of the will, from which the last paragraph is taken, is as follows:

> *"If either of my sons die without lineal descendants the one surviving shall take his estate above bequeathed*, and if the survivor die without leaving lineal descendants then one-half both of the deced-

> ent's original portion as well as one-half of the portion taken by survivorship shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother Peter, be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving then the share shall go to my other brothers and sisters surviving at the time of such decease of my son. I make the following explanation. *The limitation over on the death of my surviving son* without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. *Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years respectively. The above limitations over shall give way to the provision of such wills.*"

The foregoing italicized clause is consistent with a defeasible fee in the sons, but not with a life estate. If the estate given the sons should survive them and not have been divested by the limitations over, such estate would be the proper subject for disposition by will.

> "Nothing in the foregoing will shall be construed as to *deprive* my sons disposing of their portions by will."

"Deprive" means to take away. The testator then explains in the same clause what he refers to as liable to deprive his sons of disposing of their property by will. He says: "The above limitations over shall give way to the provisions of such wills."

Deprive or take away from what? Manifestly from the estate devised his sons. But as an estate to be the subject of a will must be a fee simple, therefore, the testa-

tor must have meant that nothing in his will should be construed to deprive his sons from disposing of their defeasible fee, and that the limitation over should give way to such will.

The supreme court of Ohio in *Anderson vs. The United Realty Company, et al.*, 79 O. S., 23, construing this part of the Anderson will, in the course of its opinion at page 53 say:

> "This is not the gift to the sons of a power to dispose of the estate by will. In the contemplation of the testator that power they already had upon attaining the age of twenty-one years for he says they are not to be *deprived* of it. If it be said that this explanation merely qualifies the limitation over, then it does not help the plaintiff, and if taken literally, then the sons upon attaining the age of twenty-one years could dispose of their estates by will even though they had children, which is inconsistent with an intention of the testator to make the grandchildren objects of *his* bounty. The evident intention of the testator was to give his sons absolute estates to be divested only in case they died without issue living at the time of their decease and without having disposed of the estate by will."

Citing and quoting authorities.

The testator in effect says, this fee given my sons shall not be defeasible if they leave children or dispose of their property by will, and this clause sets aside the limitation over in case the sons make wills.

In the opinion of the testator the limitation over was the only legal obstacle in the way of his sons disposing of their property by will, and this would be true if they took a fee defeasible on their dying without issue, and to meet this obstacle he, therefore, said the limitations over should give way to such wills, but if the sons took only a life estate with the remainder in their children, if they left any, then their estate would terminate with their lives, and

the remainder in the sons' children would prevent the sons devising their property unless the remainders also should give way to such wills. Had the testator intended his sons to take only a life estate with the remainder in their children, he would have said that such remainder as well as the limitations over shall give way to such wills.

We respectfully submit that this language of the will clearly shows that it was the intention of the testator to give a fee to his sons, defeasible if they died without issue and without disposing of their portions by will.

Nearly the last clause in the will clearly indicates the intention of the testator to have been to vest in his sons more than a life estate, namely, a fee determinable in each of his sons upon the death of either without lineal descendants. This clause is not specifically referred to in the opinion of the circuit court of appeals, but it seems to us significant and important. It is as follows:

> "I have directed that a portion of my property shall be placed in the hands of my sons on their arriving at twenty-one, and I have directed that my trustees shall have the power to procure extensions of my debts, and I have made the payment to my sons dependent upon the payment of my debts. Now, on reconsideration, it occurs to me that it may so happen that there will be outstanding and *unadjusted accounts* at the time my sons arrive at twenty-one, *and yet it might be in no wise injurious or improper* to place my sons in possession of a part of what *may be coming to them*. My trustees are therefore authorized, if they think fit, to let them *have* a portion of what is *coming to them* at twenty-one, even though some debts may remain unpaid. The amount of such portion shall be according to the discretion of my trustees. It shall not exceed the amount that is limited to them on the payment of debts, nor ought it to be an amount that would jeopardize their payment."

If the testator intended that his sons should take a life estate only, there would not be the solicitude, which this clause indicates, on the part of the testator in reference to the payment of debts against his estate. It seems, therefore, clear that the testator had in his mind that his sons were taking what in all probability would result in absolute ownership, and that as such, if a sufficient amount of the estate was not reserved for the payment of debts, and if his sons wasted or lost that portion of the estate, which, to use the language of this clause, "was coming to them" (the sons), then the creditors of the estate might sustain loss.

If the testator did not think he was leaving something more than a life estate to his sons, then there could be no rational fear, on the part of the testator, that giving his sons "what was coming to them at twenty-one" (to use the language of the testator), would "jeopardize" the payment of testator's debts.

We further respectfully submit that the construction of the will adopted by the circuit court of appeals, does violence to the dispositive provisions of the will, and that all of the above clauses and words therein, are incompatible with the existence of a life estate *only* in the sons, —whereas the construction of the will for which petitioner contends, harmonizes each and every clause, does violence to none, and is the only construction which gives full force and effect to the entire will. We claim that the sons took a fee determinable upon death without lineal descendants.

We also direct the court's attention to a paragraph near the end of the will, commencing with the word "remark," as follows:

> "Remark. If the payment of the interest on the legacies *jeopardize* the payment of debts, the payment of such interest must cease, etc."

No one would dispute that the legacies were absolutely given, and it is significant that the testator, in referring to the legacies, used the same expression "jeopardize the payment of debts," as used by him in authorizing the executors to pay to his sons the part of his estate which might be coming to them.

It seems clear to us that the testator intended his sons should take his entire property, but that if they both died without children, and without willing the property away, then he intended his estate should go to his brothers or their children.

Now how does the devise over to the brothers in case his sons should die without children, or intestate, show an intention to give to his sons less than a fee simple in case they should leave children, or a will?

We contend that the limitation over on the surviving sons dying without children and intestate, does not tend to show the intention to devise a less estate to the sons. It was a defeasance of the estate devised to the sons, not however inconsistent with a devise of a fee simple in case they died leaving children.

Peter Anderson Acquired no Title Under the Will of His Grandfather.

In Anderson vs. The United Realty Co., Messinger, et al., an action brought in the state court by respondent against petitioner and others, asserting title to property adjoining that, the title to which is in controversy herein, and involving the same questions of fact and law, the supreme court of Ohio held that respondent acquired no interest under the will of Henry Anderson.

Anderson vs. The United Realty Co., et al.,
79 O. S., 23.

This decision affirmed the judgment of the common pleas court of Lucas county, Ohio, rendered March 31, 1906, and of the circuit court of Lucas county, Ohio, rendered January 21, 1907 (19 Cir. Dec., 267; 29 Cir. Court Rep., 267), and we respectfully submit follows the established rule of property, the public policy and course of decision in Ohio, and reaffirms the settled construction of section 5970 of the Revised Statutes of Ohio, now section 10580, General Code, adopted and in effect since 1840, same being as follows:

> "Every devise of lands, tenements or hereditaments in any will hereafter made, *shall* be construed to convey all the estate of the devisor therein, which he could lawfully devise, *unless it shall clearly appear by the will that the devisor intended to convey a less estate.*"

Twelve out of the sixteen Ohio judges sitting in the different cases in which the Anderson will have been construed, have held in favor of petitioner's title. We respectfully submit that notwithstanding the exactly opposite opinion of the three honorable circuit judges of the sixth circuit, it cannot, in view of this conflict of decision, be said that *"it clearly appears"* from this will that the testator thereby intended to convey less than an estate in fee simple.

All that is claimed by counsel for respondent is that it is implied from the limitation over that less than a fee was given to the sons. Such implication, however, does not meet the statutory requirement that it shall "clearly appear."

The circuit court of appeals, however, held that under the will of Henry Anderson, respondent took an estate in remainder, upon the decease of his father. (*Anderson vs. Messinger*, 146 Fed., 929.)

We respectfully submit that this construction and decision are wrong, and contrary to a long settled rule of property in Ohio:

Abbot vs. Essex Co., 18 How., 202.

Parrish vs. Ferris, 6 O. S., 563.

Niles vs. Gray, 12 O. S., 320-331, citing and following Abbot vs. Essex Co., *supra.*

Taylor vs. Foster, 17 O. S., 166.

Piatt vs. Sinton, 37 O. S., 353-355.

Martin vs. Lapham, 38 O. S., 538-541.

Collins vs. Collins, 40 O. S., 353.

Durfee vs. MacNeil, 58 O. S., 238-244.

Anderson vs. The United Realty Company, et al., 79 O. S., 23.

Sec. 5970, R. S., O. (10580, General Code).

Walker vs. Walker, 20 Ohio Cir. Ct., 409 (1900).

Darlington vs. Compton, 20 Ohio Cir. Ct., 242 (1900).

Pendleton vs. Bowler, 27 Cinn. Law Bulletin, 313, 316 (1892).

None of the last three cases was carried any higher.

The federal courts must look to the law of the state in which land is situated for the rules which govern its descent, alienation and transfer and for the effect and construction of wills and other instruments conveying title thereto, and in trials at law must regard the state law as a rule of decision.

Sec. 721, U. S. Rev. Stat.

Brine vs. Ins. Co., 96 U. S., 627, 634.

DeVaughn vs. Hutchinson, 165 U. S., 566, 570.

Clarke vs. Clarke, 178 U. S., 186, 190, 191.

Orr vs. Gilman, 183 U. S., 278, 286.
East Central Co. vs. Central Co., 204 U. S., 266, 272.
Olmstead vs. Olmstead, 216 U. S., 386.

And we respectfully submit that the circuit court of appeals did not follow the Ohio decisions and statute, and therein erred.

Roberts vs. Lewis, 153 U. S., 367.
Yocum vs. Parker, 134 Fed., 205 (C. C. A., 8th Cir.), (1904).
Bilger vs. Nunan, 186 Fed., 665 (C. C. Oregon).
Devecmon vs. Shaw, 70 Maryland, 219-226.

Roberts vs. Lewis, Supra, presents a situation closely analogous in principle to that raised for consideration upon the record in *Anderson vs. Messinger*.

In a previous case between different parties, and as to different land, but *involving the construction of the same will*, the United States Supreme Court had decided that a *life estate only* was conveyed.

Giles vs. Little, 104 U. S., 291.

After that decision, suit was brought in the *state court* by several grantees of the so-called life tenant, or first taker, to quiet their titles, and the supreme court of Nebraska held that under the statute of the state, the will enabled the widow (the first taker), prior to her remarriage, to convey an estate in fee simple in any of the lands whereof her deceased husband had died seized.

Little vs. Giles, 25 Neb., 313.

The statute construed in this case is in substance and effect a copy of section 5970 of the Revised Statutes of

Ohio (now Section 10.580, General Code), cited and quoted above.

The circuit court of appeals certified certain questions to this Court, and asked whether in determining the nature of the estate that vested under said will, the reviewing court should be governed by the former decision of this Court or by the subsequent decision of the state supreme court.

This Court on reconsideration of the whole matter was of opinion that the circuit court of appeals in determining the nature of the estate which vested under said will, should be governed, not by its former decision, but by the decision of the supreme court of Nebraska (153 U. S., 367-379).

Before the case under review was begun the circuit court of appeals for the eighth circuit, in 1904, in *Yocum vs. Parker,* 134 Fed., 205, above cited, construed a will and statute of Missouri very similar to the Anderson will and the Ohio statute respectively, and the court held a defeasible fee passed.

Decisions Construing Statutes Like the Ohio Statute.

In Page on Wills, section 562, pages 653-4, it is said:

> "In most of the states the common law rule that a devise is presumed to be for life only has been abrogated by statute, and it is commonly provided in analogy to the rule applying to personal property, that a devise of lands should be construed to convey the entire estate of the testator in such lands, as far as he can lawfully dispose of the same, unless it clearly appears from the will that the testator meant to dispose of a smaller interest."

Statutes similar to that in Ohio were considered and construed in the following will cases, in each of which it was claimed that there was some provision or limitation

over, similar to the one in the Anderson will, which avoided the effect of the statute.

We respectfully ask the special attention of the court to the case of *Devecmon vs. Shaw*, 70 Maryland, 210-226, also cited above.

The will therein construed was very similar to the Anderson will, and the decision involved the effect of a statute much like that of Ohio. Land was devised to a daughter, with a contingent limitation over in case she should die without issue, and it was argued that the limitation over showed an intention not to devise a fee simple, and that, therefore, the statute did not apply, but the court held otherwise.

The Maryland statute is quoted in the opinion in this case at page 225, as follows:

> "But the Act of 1825, Ch., 119, Art. 93, Sec. 305, of the Code, has declared that, in every will devising real estate, where no words of perpetuity or limitation are used, 'the devisee shall take under and by virtue of such devise, the entire and absolute estate and interest of the testator in such lands or real property, unless it shall appear by devise over, or by words of limitation or otherwise, that the testator *intended to devise a less estate and interest.*' Now it is true the testator did not intend to devise his entire indefeasible estate in the property mentioned to his daughter, in all events; but as I think, it is manifest he intended it to vest in his daughter, with the contingent limitation over. That limitation is in no way inconsistent with the devise of a fee simple estate to the daughter; and the limitation over, therefore, does not furnish the least evidence of an intention to give to the daughter a less estate than a defeasible fee simple."

In *Snyder vs. Baer*, 144 Pa. St., 278, the Pennsylvania statute is quoted and applied at page 287 as follows:

"We think the case comes within the ninth section of the Act of April 8, 1833, which declares:

'All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appears by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less estate'."

See also Kiefer vs. Keepler, 173 Pa. St., 181.

The Massachusetts statute came under consideration in the case of *Simons vs. Simons*, 168 Mass., pp. 144-6.

The statute is recited at pp. 145-6, and is as follows:

"That every devise shall be construed to convey all the estate, which the testator could lawfully devise in the lands mentioned, unless it *clearly* appears by the will that he intended to convey a less estate."

Being the exact words of the Ohio statute.

The syllabus of the case is as follows:

"A testator by will separated his homestead from the rest of his real estate, and gave his widow and unmarried daughter the use and improvement of it while they remained unmarried, the provision concluding 'the use of said house and personal property to be shared equally by them, they paying the taxes and insurance thereon and keeping the same in repair, and at the decease of my said wife, I give the same to my two daughters and the survivor of them.' Held, that the daughters took a remainder in fee as joint tenants."

The Rhode Island statute was considered in the case of *Harris vs. Dyer*, 18 R. I., 540-3, and is quoted as follows:

"Whenever any estate shall be devised without words of limitation, such devise shall be construed to pass the fee simple or the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

It will be noticed that this statute is almost in the words of the Ohio statute. In this case there was a limitation over on certain contingencies like in the Anderson will, and it was argued the same as it is in the present case, that the statute did not apply, but the court held that it did.

In the course of the opinion, at page 543, the court, considering the limitation over, say:

> "We think that the testator's intent is sufficiently manifest. The gift is of the residue of the testator's estate. It is never to be presumed that the testator intended to die intestate as to any part of his property. Though the devise contains no words of limitation, the word 'estate,' as is well understood, has frequently been held broad enough, unless restrained by the context, to pass a fee. In the devise before us there is nothing in the context to restrict its effect; on the contrary, by the terms of the gift over, the survivors or issue, as the case may be, are to take the portion of the deceased party or parent; so that, if the survivors or issue are to take in fee the portion of the deceased, it necessarily follows that the deceased from whom that portion is to be taken, must also have taken in fee; and unless the children or the survivors of them or issue are to take in fee, the testator will have died intestate as to the remainder in fee, a construction which is not to be adopted if it can reasonably be avoided."

Various provisions and limitations in the will there construed were relied on to take the will out of the effect of the statute, but the supreme court of Texas held otherwise.

With these decisions from five different states under statutes in effect substantially the same as ours, how can it be claimed that the Ohio statute does not apply to the Anderson will, and assuming that it does apply, how can

it be claimed that it clearly appears that Henry Anderson did not intend to convey a fee simple?

The Texas statute came under consideration in the case of *May vs. San Antonio*, 83 Texas, 502, and is quoted on page 508 as follows:

> "The revised statutes provide that every estate in lands, which shall hereafter be * * devised to one, although other words heretofore necessary at common law to transfer an estate in fee simple be not added, shall be deemed a fee simple, if a less estate be not limited by *express words*, or do not appear to have been devised by construction or operation of law.
>
> "We think that under the statute (Rev. Stat., Art. 551), *it must clearly appear* from the language (of the will in this case), that a less estate was intended to be created, otherwise the devise will be 'deemed to be in fee simple'."

The supreme court of Texas construed this statute as though it contained the identical words "shall clearly appear," used in the Ohio statute.

Independently of Statute the Will Devised Only a Defeasible Fee.

We further respectfully submit that, under the Ohio decisions, independently of statute, James H. Anderson took a defeasible fee by his father's will. If we are correct in this it follows that the death of James, leaving a lineal descendant, rendered it impossible that the condition of defeasance should ever become effective.

In *Thompson vs. Hoop*, 6 O. S., 480 (decided 1856), the supreme court of Ohio, construing a will probated in 1816, held that:

> "No words of perpetuity being essential in a will to pass an estate of inheritance, if the language

used as descriptive of the estate, be general and sufficient to comprehend the whole property, without any words of limitation or provision in the will qualifying the interest devised, a fee in the land will pass."

And in the opinion, at page 489, the court say:

"This is in accordance with the course of adjudication in this state for many years," and cite *Smith vs. Berry*, 8 Ohio, 365, decided 1838.

It is everywhere conceded that neither the *word "heirs"* nor other words of inheritance are necessary in a will to pass a fee.

Schouler on Wills, 262, p. 549.

In *Parish vs. Ferris*, 6 O. S., 563 (decided 1856), it was held that:

"Where there is a devise in fee to A, but if he 'die without heirs,' or 'without children,' or 'without issue,' then to B in fee, the words 'if he die without issue,' or words of similar import, are to be interpreted according to their popular and natural meaning, and as referring to the time of the death of A unless the contrary intention is plainly expressed in the will, or is necessary to carry out its undoubted purposes."

In the leading case of *Niles vs. Gray*, 12 O. S., 320, (decided 1861), the supreme court of Ohio construed the will of Robert Harper, dated August 14, 1813, wherein the testator, after devising to his eldest son, Matthew, certain land, used the following language:

"Item Third: I give and bequeath to my youngest daughter, Margaret Harper, the remaining part of my real property.

"Item Fourth: I give and bequeath unto my eldest daughter, Jane Harper, but since married, Jane Davis, if personally herself appearing, fifty dollars, to be paid by my eldest son, Matthew Harper, and

my youngest daughter, Margaret Harper, according to the property given them in this my last will. It is also to be understood, that should my youngest daughter, Margaret Harper, die without any legitimate heirs, her part of my real estate shall fall to my eldest son, Matthew Harper."

Held:

"That the language of 'Item Third' is sufficient, standing alone, to vest in Margaret a fee simple estate, and in its effect upon subsequent provisions of the will, is to be considered the same as if he had devised the residue of his real estate to Margaret, her heirs and assigns forever.

"That the words 'legitimate heirs,' mean *legitimate issue*, and the whole clause, 'should my youngest daughter, Margaret Harper, die without any legitimate heirs,' refers to a definite, and not an indefinite failure of issue, and are to be construed as if the words '*living at the time of her death*' had been added after the words 'legitimate heirs.'

"That under Items Third and Fourth, taken together, Margaret took an estate in fee simple, subject, however, to be determined by the contingency of her dying without issue living at the time of her death, on the happening of which, the estate would pass over to Matthew, by way of executory devise."

In the course of the opinion, at page 331-2, the court, in support of the Ohio rule, cites and quotes from the decision of this court in *Abbot vs. Essex Co.*, 18 How., 202 (decided 1855), as follows:

"In *Abbot vs. Essex Co.*, this question was before the Supreme Court of the United States. In that case, the following was the clause of the will: 'I give to my two sons, viz.: John and Jacob, all my lands, etc., live stock, etc., tools, etc., bonds, etc., to be equally divided between them, and the executor is ordered to pay debts out of that part of the estate. *Item*—It is my will that if either of my said sons, John and Jacob, should happen to die without any lawful heirs of their own, then the share of him who may first decease, shall accrue to the other

survivor and his heirs.' And it was unanimously held, that this 'gave an estate in fee simple to John and Jacob; and the share of the one who first died without issue, passed over to the other son by way of executory devise'."

It is of interest to note that the decision of the court in *Niles vs. Gray, supra*, sustains the contention of the plaintiffs therein, who were represented by Messrs. Taft & Perry, eminent Ohio lawyers, and from the report of the case we take the liberty of adopting and quoting the substance of their argument:

> "The words 'I give and bequeath unto my youngest daughter, Margaret Harper, the remaining part of my real property,' in the will, gives Margaret a fee simple estate. That these words in the will, though by the common law of England and of many of the states, would have formed a life estate only, are such as to create a fee simple estate in Margaret, seems not to be controverted; nor could it be disputed in Ohio, with any hope of success. *Smith vs. Berry*, 8 Ohio, 365; *Thompson vs. Hoop*, 6 O. S., 480.
>
> "The added words 'should Margaret die without any legitimate heirs, her part of my estate shall fall to my eldest son Matthew,' do not, by the law of Ohio imply an estate tail in Margaret."
>
> * * * * * *
>
> "Now, when it is remembered: 1. That the third item of the will of Robert Harper, unaccompanied by other words, by the law of Ohio passes a fee simple to Margaret, with the same certainty as if the words 'to her and her heirs' had been used; and 2. That it has been settled in Ohio, that the words 'dying without issue' in a will, mean 'dying without issue living at the death of the first taker,' the whole case is clear, in the light of the English as well as the American decisions, and no implication of an estate tail can arise."
>
> * * * * * *
>
> "If here were *added words*, sufficient to rebut the presumption, or it should rather be called the perversion in favor of an indefinite failure of issue,

there would be no estate tail, and no attempt to create one. But in the state of Ohio, there is no such presumption; and the case, stands precisely as if there were added words sufficient to rebut it in every case. This court has expressly decided, that the same words, which in England would have implied an estate tail, imply no such thing here."

The doctrine announced in *Niles vs. Gray, supra,* was approved and followed in *Piatt vs. Sinton,* 37 O. S., 353, (decided in 1881), wherein it was held:

"A devise by a testator of *all* of his property, of every description, whether real, personal or mixed, after paying all his just debts, is a devise of the fee, without the aid of a statute declaring such to be the effect of the devise.

"Where there is a devise in fee, with a provision in the will that in case the devisee should die without leaving any legitimate heirs of her body, then the estate should go over to persons named, the fee taken by the first devisee is determinable only on the contingency of her dying without leaving such heirs living at the time of her death. *Niles vs. Gray,* 12 O. S., 320, followed."

In order to bring a will containing a limitation over within the rule of these two cases, the devising words must be such, standing alone, as to vest a fee simple in the devisee, and then the estate devised is held to be a defeasible fee. The language devising a fee need not mention heirs or fee simple, but any words which signify an intention to convey the whole estate of the testator are sufficient.

In neither *Niles vs. Gray, supra,* nor *Piatt vs. Sinton, supra,* was the word "*heirs*" or the word "*fee*" used in the respective wills construed in these cases, but in each the words used show an intention to devise the whole estate of the testator, and it was held, therefore, that a fee simple was intended. The Anderson will in this particular is like these wills.

The language used in the will of Henry Anderson shows, we respectfully submit, that the whole interest of the testator was intended to be devised to the sons, subject to defeasance, and should have been construed so as to conform to the decisions of the supreme court of Ohio, in *Niles vs. Gray, supra*, and *Piatt vs. Sinton, supra.*

To the same effect are the following cases:

Taylor vs. Foster, 17 O. S., 166.
Collins vs. Collins, 40 O. S., 353.
Durfee vs. MacNeal, 58 O. S., 238.

(The word "heirs" was used in the will construed in each of these cases.)

The same rule was followed and announced by the supreme court of Ohio in construing the will now under consideration in the case under review, in *Anderson vs. The United Realty Co., et al.*, 79 O. S., 23 (decided 1908).

Should this honorable court arrive at the conclusion that the devising part of the will of Henry Anderson, standing alone, is sufficient to vest a fee in the sons, or the survivors of them:

> "Then the effect upon subsequent provisions of the will is to be considered the same as if he had devised his real estate to his sons, their heirs and assigns, forever."
>
> Niles vs. Gray, 12 O. S., 320.

In all five of the cases last above cited, there was a devise in fee to a primary devisee, with a limitation over in case such devisee should die without issue, and the court impliedly held in each case that the devise of a fee simple to the primary devisee was not inconsistent with the limitation over in case such devisee should die without issue, nor was the limitation over inconsistent with the

devise of a defeasible fee to the primary devisee or donee. It follows from these authorities that such a conditional limitation over does not show an intention to devise less than a defeasible fee to the primary devisee or donee, and if this be true, without the aid of the Ohio statute, much more is it so by reason thereof, the act, in effect, declaring such devises as that made in the Anderson will to the sons to be a defeasible fee, because it does not clearly appear that the testator intended to devise a less estate.

The decision in *Darlington vs. Compton*, 20 Ohio Cir. Ct., 242, above cited, is so directly applicable to the situation here that we quote:

> "In argument, the contention for the defendants was, that by the devise to her the plaintiff took only a life estate in the lands, while the remainder in fee is vested in them. But this we think is wholly untenable. The devisor says: 'I will and bequeath to my daughter,' naming her, this property. That was sufficient to pass an estate of inheritance, and standing alone would be given such effect, without reference to our statute. (*Smith vs. Berry*, 8 Ohio, 365; *Thompson vs. Hoop*, 6 Ohio St., 481). This is emphasized evidently by section 5970, Revised Statutes, which requires that every devise of lands 'be construed to convey all the estate of the testator therein, which he could lawfully devise, unless it shall clearly appear by the will' that he 'intended to convey a less estate.'
>
> There is no suggestion here that the plaintiff was not to take the fee, unless found in the last clause of item four, providing to whom the lands shall go, in case she dies 'leaving no legal heirs.' That, therefore, furnishes the sole basis for the defendants' claim. But it cannot be given the effect for which they contend. The law is settled in Ohio on that proposition. The principle established is, that the 'limitation over does not refer at all to the quantity of the estate before devised,' but 'simply designates the contingency on the happening of which that estate, whatever was its quantum,' shall pass over to

others—in this instance to the brothers and sisters. The will is to be read, therefore, exactly as it would be if the devise had been to the plaintiff, her heirs and assigns forever. Consequently the defendants can have no present right in or title to these lands. Their only interest in them is future, contingent, and by way of executory devise. (*Niles vs. Gray*, 12 Ohio St., 320; *Durfee vs. MacNeil*, 58 Ohio St., 238; *Thompson vs. Hoop*, 6 Ohio St., 481.)"

The Will Did Not Create a Remainder by Implication.

We respectfully submit that the circuit court of appeals erred in holding that it was the intention of Henry Anderson to give the lineal descendants of his surviving son an estate in remainder at his decease.

The court appears to have reached the conclusion it did without considering or regarding the important, basic distinction between definite and indefinite failure of issue.

Definite and Indefinite Failure of Issue.

The limitation over provided for in the Anderson will, viz: the non-existence of grandchildren, must have occurred, if at all, upon the death of the surviving son, and constitutes what is known as a definite failure of issue.

We respectfully submit that since the will provided a limitation over on a definite failure of issue, that an estate tail, or an estate in remainder, was not and could not have been created or implied, and that such an estate could only have been created or implied from a limitation over on an indefinite failure of issue, which by will may occur without reference to any particular time.

Chancellor Kent defines definite and indefinite failure of issue as follows:

"A definite failure of issue is, when a precise time is fixed by the will for the failure of issue, as in

the case of a devise to A, but if he *dies without lawful issue living at the time of his death.* An indefinite failure of issue is a proposition the very converse of the other, and means a failure of issue, whenever it shall happen, sooner or later, without any fixed, certain, or definite period, within which it must happen. It means the period when the issue, or descendants of the first taker, shall become extinct, and when there is no longer any issue of the issue of the grantee, without reference to any particular time or any particular event."

Kent's Commentaries, Vol. 4, pp. 274-5, star paging.

And in Tiffany on Real Property, Vol. 1, Sec. 25, p. 63 (bottom paging), it is said:

"By an indefinite failure of issue is meant a failure of issue which may occur at any time in the future and not a failure at the time of the decease of the first taker or at any other fixed time."

In Jarman on Wills (6th Ed.) (Bigelow), Vol. 2, star paging 1320, other paging 460, it is said:

"Another question formerly of frequent occurrence, and which may even now occasionally occur in the construction of words importing a failure of issue, is, whether they refer to issue indefinitely (*i. e.*, to a failure of issue at any time), or to a failure of issue at the death. Upon this depends their operation to confer an estate tail; for it is only when the words denote an extinction of the specified issue irrespective of time or any collateral circumstance that they create such an estate."

See also Washburn on Real Property (5th Ed.), Vol. 2, p. 355 star paging, or 753 other paging.

This question was considered and passed upon by the supreme court of Ohio in *Niles vs. Gray, supra,* wherein it was said:

"Now, what is the legal effect of a testamentary disposition, couched in this language? We think we are safe in saying, that ever since the case of *Pells vs. Brown*, decided in the reign of James I. (Cro. Jac., 500), it has been the established doctrine in England that such a devise vests in the primary devisee a determinable fee simple, and not a fee tail; and on the happening of the contingency on which the fee is to be determined, the estate passes over, not as a remainder, but by way of executory devise. In that case the devise was 'to Thomas and his heirs forever; and if Thomas died without issue, living William, then to William.' This was held to be a devise in fee to Thomas, and not an estate tail; the words 'living William,' were thought sufficient to make the devise over to William an executory devise."

Niles vs. Gray, 12 O. S., 320-330-1.

The authorities clearly establish that a limitation over after definite failure of issue, creates a defeasible fee:

Pells vs. Brown, 3 Croke's Rep., 590.

DeWolf vs. Middleton, 18 R. I., 810, 813.

Toman vs. Dunlop, 18 Pa. St., 72, 76.

Jordan vs. Roach, 32 Miss., 481, 608.

Daniel vs. Thompson, 14 B. Monroe (Ky.), 662, 670.

Den ex dem Wardell vs. Allaire, 20 N. J. Law (Spencer) 6, 4th syllabus.

Page on Wills, Sec. 591.

Ever since *Pells vs. Brown, supra*, courts have almost uniformly refused to imply title in the issue on whose failure the limitation over must occur. Where the failure of issue and limitation over must occur, if at all, on the death of the first devisee, all such limitations over have in Ohio been uniformly held to be definite failures of issue, and implied no title in any person; and if issue be then living the first devisee is held to have taken a fee and

if none be then living then the estate is held to pass over by way of executory devise.

Parish vs. Ferris, 6 O. S., 563.

Niles vs. Gray, 12 O. S., 320, and authorities cited.

The Clear Weight of Authority is Against the Construction of the Will Adopted by the Circuit Court of Appeals.

The construction of the Anderson will by the circuit court of appeals (146 Fed., 929, 941), rests largely upon three cases which have been either discredited or overruled in the several states in which they arose, viz:

Shaw vs. Hoard, 18 O. S., 228.

Wetter vs. United Hydraulic Cotton Press Co., 75 Ga., 540.

Carr vs. Green, 2 McCord (S. C.), 75.

1. The rule in Ohio applicable to the Anderson will, certainly is not as declared in *Shaw vs. Hoard*, but the opposite, as held by the supreme court in Anderson vs. The United Realty Co., 79 O. S., 23, and cases therein cited and followed.

2. In Georgia, not as in *Wetter vs. United Hydraulic Cotton Press Co.*, but the opposite, as in *Matthews vs. Hudson*, 81 Ga., 126; *Chewing vs. Shumate*, 106 Ga., 751; *Hill vs. Terrell*, 123 Ga., 49; *Kinard vs. Hale*, 128 Ga., 485.

Reviewing many decisions in Georgia, the supreme court of that state in *Hill vs. Terrell*, 123 Ga., 49, *supra*, at page 58 says:

> "In the harmony of these decisions there is but a single note of discord—*Wetter vs. United Hydraulic Cotton Press Co.*, 75 Ga., 540."

3. *Carr vs. Green*, 2 McCord (S. C.) 75, (1822), cited and relied upon by the circuit court of appeals, construed a will which was given exactly the opposite construction in *Carr vs. Jeanerett*, 2 McCord (S. C.) 66, the report of which in the same volume immediately precedes the case of *Carr vs. Green*.

The history of these cases and the overruling of *Carr vs. Green*, in *Carr vs. Porter*, 1 McCord, Ch. 60 (1825), is fully stated in *Shaw vs. Erwin*, 41 S. C., 209-213 (1894), and also in *Bond vs. Moore*, 236 Ill., 576-586, fully reviewed at page 89 of this brief.

Other cases overruling *Carr vs. Green*, are:

Durant vs. Nash, 30 S. C., 184 (1889).
Gordon vs. Gordon, 32 S. C., 563 (1890).
Powers vs. Bullwinkle, 33 S. C., 293 (1890).
Thompson vs. Peake, 38 S. C., 440 (1893).
Sheppard vs. Jones, 77 S. C. 274, 279 (1907).

The decision of the circuit court of appeals is also opposed to the decisions of the highest court of Mississippi, where the testator resided when his will was drawn, executed and took effect.

Jordon vs. Roach, 32 Miss., 481, 604.
Sims vs. Conger, 39 Miss., 231.
Busby vs. Rhodes, 58 Miss., 237.
Johnson vs DeLome, 77 Miss., 15.
Halsey vs. Gee, 79 Miss., 193 (1908).

The decision of the circuit court of appeals is also contrary to the decisions of the highest courts of all the states comprising the territory over which the jurisdiction of that court extends in addition to Ohio, to-wit: Kentucky, Tennessee and Michigan.

Hart vs. Thompson, 42 Ky., 482.
Daniel vs. Thompson, 53 Ky., 562.

Harris vs. Berry, 70 Ky., 113.
Sale vs. Crutchfield, 71 Ky., 636.
Crozier vs. Cundall, 99 Ky., 202.
Smith vs. Ballard, 117 Ky., 179.
Harvey vs. Bell, 118 Ky., 512.
Rice vs. Rice, 118 S. W. 270, (Ky.)
Williamson vs. Tunis, 107 Tenn., 83.
Mullreed vs. Clark, 110 Mich., 229.

A case not without probable embarrassment to counsel for respondent is *Williamson vs. Tunis, Supra.*

The special advocate here of the doctrine of an implied remainder, was the earnest advocate of the same doctrine there.

The provisions of the will, as expressed by the court, were:

> "The limitation to Mrs. Green is to her, and upon her death without issue, then to her surviving brothers and sisters."

It will be observed that this language is the same in effect as the provisions of the Anderson will.

On p. 85 (bottom) the court said:

> "The contention on complainant's part is that the proper construction of such limitation is that in the event there is issue as in the case of Mrs. Green, such issue take a remainder under the will, while for the defendants the contention is that in the event there is issue the estate of the first taker, Mrs. Green, became absolute. In other words the estate was vested in Mrs. Green subject only to be defeated by her dying without issue.
>
> * * * * *
>
> The consequence is that as to Mrs. Green's share it is absolute under the terms of the will, except in the one contingency that she die leaving no issue, and that contingency not having happened, but she having died leaving issue, the estate was absolute, and would, in the absence of any other disposition, have passed to

her heirs as such, and her children would have had no interest as devisees, though they might have taken as heirs. But in the meantime she and her son, defendant J. N. Green, disposed of her interest in the estate to the ancestor of defendants, and vested in him all their interest, share and estate. *Petty vs. Moore*, 5 Sneed, 128; *Owen vs. Hancock*, 1 Head., 563; *Alston vs. Davis*, 2 Head., 266; *Cowan, McClung & Co. vs. Wells*, 5 Lea, 684. These cases in substance hold that under like limitations and terms the birth and survival of a child determines the contingency, and the estate is vested and absolute, and there being no express limitation to the children, none will be implied, and they will take nothing as devisees."

This case is, we submit, a fair sample from an increasing volume of decisions against the doctrine of an implied remainder, from courts the country over, entitled to high respect. That doctrine is now obsolete, vestigial.

We respectfully contend and submit that the decision of the circuit court of appeals is also contrary to the decisions of the Supreme Court of the United States in:

Abbot vs. Essex Co., 18 How., 202.
Britton vs. Thornton, 112 U. S., 526.
Roberts vs. Lewis, 153 U. S., 367.

In *Britton vs. Thornton, supra*, at page 532 the court say:

"The question which lies at the foundation of this case is what estate Eliza Ann Thornton took in the land which Joseph Thornton specifically devised to her 'provided that should the said Eliza Ann die in her minority, and without lawful issue then living, the lands hereby devised shall revert and become part of the residue of my estate hereinafter disposed of.'

By this specific devise, Eliza Ann Thornton took an estate in fee, defeasible by an executory devise over." (Italics ours).

In this conclusion, we submit, this court decided adversely to the respondent the construction of the Anderson will for which he contends.

And in addition to the state courts above cited is contrary to the decisions of the highest courts of the following states:

Newson vs. Holesapple, 101 Ala., 682.
Carter vs. Couch, 157 Ala., 470.
Friedman vs. Steiner, 107 Ill., 125.
Summers vs. Smith, 127 Ill., 645.
Bond vs. Moore, 236 Ill., 576.
Kendall vs. Taylor, 245 Ill., 617.
Greer vs. Wilson, 108 Ind., 322.
Woodman vs. Madigar, 58 N. H., 6.
Stewart vs. Knight, 62 N. J. Eq., 232.
Hilleary vs. Hilleary Lessees, 26 Md., 274.
Hutchins vs. Pearce, 80 Md., 434.
Yocum vs. Siler, 160 Mo., 281.
Gannon vs. Pauk, 200 Mo., 75.
In re Barrett, 85 Neb., 337.
Taylor vs. Maris, 90 N. C., 619.
Trexler vs. Holler, 107 N. C., 617.
Randall vs. Josselyn, 59 Vermont, 557-563.
Chaplin vs. Doty, 60 Vermont, 712.
Atkinson vs. McCormick, 76 Va., 791.
Randolph vs. Wright, 81 Va., 608.
Johnson's Executors vs. Bank, 83 Va., 63.
Dent vs. Pickens, 61 W. Va., 428-488.

And is also contrary to the views and conclusions of Messrs. Jarman, Underhill and other leading authors on wills.

In 1 Jarman, page 555, star paging, (Bigelow's 6th Ed) it is said:

> "VII. As no implied estate to the issue arises (as we have seen) from a limitation over in case of the prior devisee or legatee dying without leaving issue at his decease, it should seem that there is the same absence of authorized ground for implying a gift to chil-

dren from a similar limitation over in default of these objects."

See also:

Underhill on Wills, Sec. 468.

Page on Wills, Sec. 676, bottom of page 797.

Other Errors in the Decision and Judgment of the Circuit Court of Appeals.

We have endeavored to show what we regard to be the correct construction of the Anderson will, and we respectfully submit that the circuit court of appeals, in addition to the errors already discussed, erred in its construction thereof in the following respects:

1. In disregarding and failing to give effect to the disposing or operative parts of the will.

The decision challenged rests upon the erroneous conclusion that the first grant to the sons, creates only a fee by implication, and not a clear devise in fee.

This assumption, we respectfully submit, is incorrect and in conflict with the decisions of this court, the supreme court of Ohio, the Ohio statute, and the great weight of authority generally.

We cite, and rely upon the authority of *Abbot vs. Essex Co.*, 18 How., 202, but the circuit court of appeals regards, and in its opinion (146 Fed., 943) (Tr. 83, 84) cites this case as an authority sustaining its conclusions, and states that "none of the reasons on which the conclusion of the court (therein) was rested, exist in the present case." We are wholly unable to agree therewith, and respectfully submit that our view of this case in that adopted and announced by the supreme court of Ohio in *Niles vs. Gray, supra.*

2. **In failing to fully consider and give effect to all parts of the will.**

A careful examination of the opinion discloses that the principal discussion of the will is confined to a consideration of the limitation over clauses, with no discussion whatever of the legal import and effect of the word "property" and other terms used by the testator in the devise to his son, William.

3. **In failing to distinguish between definite and indefinite failure of issue.**

See this brief, page 73.

4. **In the effect given Shaw vs. Hoard, 18 O. S., 227.**

The facts and parts of the will construed in this case appear at pages 228-9 of the report.

The court held that it was the intention of the testator that his property should go to the children of his wife and daughter if they left any.

On page 233 the court say:

> "Although there are no words in the will expressly giving the estate to the issue of his wife and daughter, it is manifest he intended that their issue should have it after their decease. It would seem that he regarded it as not to be doubted, but that the property would pass to the children of his wife and daughter if they died leaving children. He was, therefore, careful only to direct what disposition should be made of his property in the event both should die without leaving any heirs of their body."

Under the statute of descent and distribution in force in Ohio, in 1852, the date of testator's death, (Swan's Rev. Stat. of Ohio, p. 286; 1841, 33 O. L., 43), Carrie A. Brown, the child of Mary Ann Hoard, by a second husband, could not inherit ancestral land from either her half sister, Barbara Ann Hoard, nor from the testator, Delonzo Hoard, her mother's

first husband, from whom the estate came. Hence she must take, if at all, under the will, as she could not take as heir at law under the statute. She must take under the will to carry out the intention of the testator.

It was, therefore, impossible to accomplish such intention without holding, as the court did (Opinion, p. 234), that the daughter of the widow by a second husband "took the property under the will either as a remainder or an executory devise." The court did not therefor affirmatively decide that an estate in remainder was devised by Hoard's will and no such conclusion is stated in the syllabus of the case. It was unnecessary, and the court did not decide, whether the widow and testator's daughter, Barbara Ann Hoard, took in fee or for life. The decision is consistent with either holding, and we submit, would have been diffierent had a purchaser from them been the claimant of the property. The court simply adjusted the *estate* devised to the *supposed intention* of the testator. This is a feature distinguishing *Shaw vs. Hoard* from all other Ohio cases before and since said case, and it, therefore, is not in conflict with *Niles vs. Gray*, 12 O. S., 320, nor the subsequent Ohio cases founded thereon.

We respectfully submit that in *Shaw vs. Hoard* the supreme court announced no settled rule of property, but upon agreed facts merely decided that the will construed showed that the intention of the testator was to have his property go to his wife and daughter during their lives, and to their children, if they left any.

We also note that in the opinion in *Shaw vs. Hoard* no authorities are cited, and there is no discussion of any legal questions. One judge dissents, and the case has never been followed in Ohio, and we respectfully submit, upon the authorities heretofore cited and examined, has been overruled by implication.

The effect given *Shaw vs. Hoard* by the circuit court of appeals disregarded the established rule that when the decisions of the highest court of a state are in conflict the last must be followed.

It should also be noted that the Hoard will did not contain any express provision giving the power of disposition to the first takers. Such power being expressly conferred by the Anderson will, distinguishes the two wills, and deprives the case of authority as a precedent for construing the Anderson will. No consideration, however, was given by the circuit court of appeals to this important distinction.

The supreme court of Ohio say with respect to such a power:

> "An absolute and uncontrolled power of disposition at the mere will, and for the sole purposes of the holder of the property, is of the very essence of absolute ownership, and where the testator has made such provision in favor of the first taker, there is strong reason for holding that he has relinquished all power to control or direct the further disposition of the property."
>
> James, Executor, vs. Pruden, 10 O. S., 251-5.

> "In *Holmes vs. Godson*, 8 De Gex M. & G., 152, a testator gave real and personal estate upon trust for his son to vest in him on his attaining the age of twenty-one years, but if he should die under twenty-one, or having attained twenty-one, should not have made a will, then the property should be sold and the proceeds held on other trusts: *Held*, that the property vested in the son absolutely at twenty-one, and that the gift over is repugnant and void."

In *Jackson vs. Robins*, 16 Johns 587, opinion by Chancellor Kent, the court say:

> "We may lay it down as an incontrovertible rule that when an estate is given to a person generally or indefinitely with a power of disposition it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate for life only by certain and express words and annexes to it a power of disposition."
>
> "If there be an absolute power of disposition given by the will to the first taker, as if an estate be devised

> to A in fee, and if he dies possessed of the property without lawful issue, the remainder over the property which he, dying without heirs, shall leave, or without selling *or* devising the same; in all such cases the remainder over is void because of his preceding fee; and it is void by way of executory devise because the limitation is inconsistent with the absolute estate expressly given or necessarily implied by the will."
>
> 4 Kent's Commentaries, 271.

The circuit court of appeals also cites the case of *Carter vs. Reddish*, 32 O. S. 1, as affirming the doctrine announced in *Shaw vs. Hoard, supra.*

The will construed in *Carter vs. Reddish* expressly provided that the testator's children should have and hold specific property devised to them "during their natural lives and to their heirs," with a limitation over to certain nephews and nieces in case the first takers should die within age and without lawful isue; and it was held that the word "heirs" in the *habendum* should be construed as a word of limitation, enlarging the life estate to a defeasible estate in fee simple.

We are at a loss to understand how this case can be regarded as sustaining the construction of the Anderson will adopted by the circuit court of appeals. The limitation over in this case was held to enlarge an express estate for life to a fee defeasible, and it seems to us supports the construction of the Anderson will for which we contend.

5. The Circuit Court of Appeals also erred in its conclusions with respect to the following Ohio cases cited by it in support of its opinion.

In *Home vs. Lippardt*, 70 O. S., 261, the will construed was held to give testator's widow power to convey the fee of the whole or any part of the estate, and that a deed making such conveyance good as against the widow, was good against the second devisee.

At page 282 of the opinion the court was careful to say:

> "The rule is, that when an estate is devised with an absolute power of disposal, a devise over of what may remain is void, but that where a life estate only is given *in express words* to the first taker, with an express power in a certain event, or for a certain purpose, to dispose of the property, the life estate is not, by such a power, enlarged to a fee or absolute right, and the devise over is good."

The circuit court of appeals must have overlooked or disregarded this part of this decision, for it certainly cannot be said that by Anderson's will "a life estate only is given in express words" to the sons, the supreme court of Ohio being careful to state that it is in such cases alone that an express power of disposition does not enlarge the life estate.

Five other Ohio cases, next considered, are cited by the circuit court of appeals in its opinion, and these sustain the rule announced in *Home vs. Lippardt, supra*, but we respectfully submit do not sustain the construction of the Anderson will adopted by the federal court.

The wills construed in *Donley vs. Shields*, 14 Ohio, 359, and in *Huston vs. Craighead*, 23 O. S., 198, each gave the testator's widow *an express estate for life*.

In *Stableton vs. Ellison*, 21 O. S., 527, the will construed first gave one of the testator's sons, his heirs and assigns forever, 113 acres of land and all of the rest to the testator's wife, allowing her to make such distribution thereof as she, in her discretion, should deem most advisable, *among* testator's ten children, the widow not to be under any obligation to give more to the son to whom the 113 acres of land had been given, "as it is not my will to give him said land over and above an equal proportion with the rest."

It was further provided that in case of the marriage of the widow, that she was to be divested of the power of distribution of the estate, and in such event the property was to

be divided according to law, but so as not to affect the title of James to the land devised to him. Under this will it was held that the widow took but a life estate, with the power to distribute the remainder among the children named in the will, but that this power was not of unlimited discretion, but required her to distribute the entire property among the children named, giving to each what she in good faith judged to be of an equal portion.

In *Baxter vs. Boyer*, 19 O. S., 490-500, the will construed was held to give a life estate to the testator's widow because of the provision of the third item thereof devising and bequeathing at the death of the testator's wife "all the property *then remaining* to the presbytery of Cincinnati;" and Welch, J., who rendered the opinion, after examining a number of authorities (at page 500) expressly recognizes the rule which, we submit, applies to Anderson's will, that where the testator gives to the first devisee full dominion and control over the estate, he cannot, under the form of a limitation over undertake to make, as it were, a will for said devisee to take effect in case the first devisee should fail to make one for himself, or otherwise to dispose of the property.

The Doctrine of an Implied Remainder Adopted by the Circuit Court of Appeals is Opposed to the Weight of Authority.

In the first decision of the circuit court of appeals, the basis of a misconstruction of the will, as we view it, is shown. (Tr. 78.) (146 Fed., 929, 938.)

In determining "what consequences the testator intended when he said, 'if either of my sons die without lineal descendants the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants, then,' to his collateral relatives," the court say:

> "Now, we cannot but think that to the common understanding this language would convey the meaning

> that in the other alternative, that is, *if the sons should leave lineal descendants, it was intended that they should take*, and that it was only in the event of their not leaving lineal descendants that the estate should go over to collateral relatives." (Italics ours.)

And upon this reasoning, the court held in effect that the respondent took a remainder by implication, a construction which, we submit, is opposed to the trend and weight of authority.

In *Bond vs. Moore*, 236 Ill., 576, decided in October, 1908, construing a will more favorable to respondent than that under which he claims, the first decision in *Anderson vs. Messinger* is considered; also several of the cases cited and relied upon therein by the circuit court of appeals, including: *Wetter vs. United Hydraulic Cotton Press Co.*, 75 Ga., 540; *Shaw vs. Hoard*, 18 O. S., 227; *Carr vs. Green*, 2 McCord, 75; as well as the leading Ohio decisions upon which we rely.

The supreme court of Illinois declined to follow *Anderson vs. Messinger*, and upon authorities cited in its opinion, shows, we submit, that the holding by that court that the Anderson will created a remainder by implication is wrong, and that the doctrine of a defeasible fee, as contended for by the petitioner here, is right.

Anderson vs. The United Realty Company, 79 O. S., 23, wherein the Anderson will was construed, was decided November 10, 1908, and the supreme court of Illinois, when it decided *Bond vs. Moore*, *supra*, did not have the benefit of that decision. Yet, in its opinion, it clearly points out that *Shaw vs. Hoard* is inconsistent with the earlier cases of *Niles vs. Gray*, 12 O. S., 320, and is, in effect, overruled by the later cases of *Carter vs. Reddish*, 32 O. S., 1, *Piatt vs. Sinton*, 37 O. S., 353, and *Collins vs. Collins*, 40 O. S., 353.

On page 580 of the opinion the court well states, upon authorities cited, that a *gift by implication must be founded upon some expression in the will. It cannot be inferred from an absolute silence on the subject.*

And cites many authorities to show that the doctrine of an *implied* gift to the children (lineal descendants), should any be born, is generally rejected.

After discussing devises wherein a fee is given to the first taker, and a subsequent clause imposes a condition, upon the happening of which the estate in fee is to terminate and another is to take its place, in effect as claimed for the petitioner here, it is said, on page 585:

> "This we have always held to constitute a determinable fee, subject to an executory devise to the subsequent takers. It leaves no room for implication. The fact that the event upon which the estate is to terminate is the death without issue of the first taker cannot affect the estate granted, *or give the issue any interest in the devise.*" (Italics ours.)

On page 586 the court deals with one of the foundation cases cited by the circuit court of appeals, as follows:

> "The case of *Carr vs. Green, supra,* (2 McCord L. 75) sustains appellees' contention, but that case is not, and never was, acknowledged law in South Carolina. It was decided by the court of appeals in equity in May, 1822. In May, 1821, the court of appeals at law, having this same will before it for consideration, had arrived at a precisely opposite result. *Carr vs. Jeannerett,* 2 M'Cord, L. 66. Thus the rights of the parties depended upon the court in which the proceedings for their determination were brought. In 1824 these two courts were abolished, and a court of appeals was established, having final appellate jurisdiction in all cases. In 1825 a case involving the same will as the two former cases was brought to the court of appeals. The reasoning of the former cases and the decisions upon which they were based were carefully reviewed, and the court of appeals, after an elaborate examination of the authorities and consideration of the principles involved, held that, under the devise to the testator's grandsons, with a devise over in default of issue, there was no devise to the issue by implication, and that an estate is never implied to issue as purchasers. *Carr vs. Porter,* 1 *McCord,* Ch. 60. This principle has since been recognized as the law by

the courts of South Carolina. In *Manigault vs. Deas, Bail*, Eq. 298, it is held that issue cannot take as purchasers, by implication, from a valid limitation over in the event of death without leaving issue, where there is no direct gift to the issue. So, also, it is held in *M'Lure vs. Young*, 3 Rich. Eq., 559, and *Addison vs. Addison*, 9 Rich. Eq. 98."

The overruling of *Carr vs. Green, supra*, is fully explained in *Shaw vs. Erwin*, 41 S. C., 209-213.

To the same effect as *Bond vs. Moore*, 236 Ill., 576, *supra*, is *Carter vs. Couch*, 157 Ala., 470.

And the doctrine we contend for, which denies an implied remainder and affirms a conditional or determinable fee, is supported by an array of authorities heretofore cited including nearly all the courts of the United States.

In Wills Similar to That of Anderson's, the Death Referred to Has Been Held to be a Death Within the Lifetime of the Testator.

That in *Stokes vs. Weston*, 142 N. Y., 433, it was held:

"The law favors the vesting of estates, and in case a will contains apt words to dispose of the testator's entire estate, that construction will be given to it.

"The will of S. gave to his wife the use of all his property for life, the remainder to his three children, two sons who were unmarried, and a daughter who was married and had two children. The will then provided that in case of the death of the sons, or either of them, without issue then living, the share of the one so dying should be divided equally between the two grandchildren. In an action for partition of lands of which the testator died seized, and for a construction of the will, *held*, that the death referred to was that of a son during the lifetime of the testator, and as they both survived him, they, with their sister, took the entire estate, subject to the life estate of the widow."

In *Washburn vs. Cope*, 144 N. Y., 287, it was held:

"Where a devise or bequest over is not dependent upon the death simply of the original beneficiary, but

upon death without issue or without children, the death referred to, in the absence of anything in other portions of the will tending to show a contrary intent, will be considered as a death in the lifetime of the testator."

See also:

Colby vs. Doty, 158 N. Y., 323.
Clark vs. Clark, 46 S. C., 230.
Karker's Appeal, 60 Pa. St., 141.
Fowler vs. Duhme, 143 Ind., 246-261.
Tarbell vs. Smith, 125 Iowa, 388.
Lawler vs. Halohan, 70 Conn., 87.

VI.

ERRORS CONCERNING TITLE ACQUIRED BY HENRY ANDERSON BY MASTER'S DEED IN FORECLOSURE PROCEEDINGS, AND CONTRACT OF OCTOBER 4, 1844.

We respectfully submit that the circuit court of appeals, in its first decision herein, erred in its construction of the contract of October 4, 1844, and in holding that Henry Anderson, by the master's deed acquired Butler's title to the Toledo property. (Tr. 74.) (146 Fed., 929-935.) (Assignments of Error, I. Sec. 3; III. Sec. 3.)

We respectfully contend here, as we did before that court, that the foreclosure proceedings, contract and master's deed did not release Butler's equity of redemption, but that the purpose and effect of the contract was to substitute the Toledo property, in trust, as collateral security in place of the Bissell note and mortgage.

From respondent's written stipulation, offered in evidence by him, it was admitted that on September 23, 1841, Henry Anderson acquired his right in the Toledo property *in trust* for Charles Butler, by written assignment appearing upon the public records of Lucas County, Ohio, of the Butler mortgage. (Sec. 2, Stipulation No. 1, Tr. 309.)

The case is, therefore, within the rule:

"Once a Mortgage, Always a Mortgage."

> "In general, all persons able to contract are permitted to determine and control their own legal relations by any agreements which are not illegal, or opposed to good morals or to public policy; but the mortgage forms a marked exception to this principle. The doctrine has been firmly established from an early day that when the character of a mortgage has attached at the commencement of the transaction, so that the instrument, whatever

be its form, is regarded in equity as a mortgage, that character of mortgage must and will always continue. If the instrument is in its essence a mortgage, the parties cannot by any stipulation, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity. The debtor or mortgagor cannot in the inception of the instrument, as a part of or collateral to its execution, in any manner deprive himself of his equitable right to come in after a default in paying the money at the stipulated time, and to pay the debt and interest, and thereby to redeem the land from the lien and encumbrance of the mortgage; the equitable right of redemption, after a default is preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right."

3 Pomeroy's Eq. Jurisprudence, 3rd Ed., Sec. 1193 and Note 1, Sec. 1196.

Respondent's own proof cast upon him the burden of proving the determination and discharge of the trust by clear and satisfactory evidence. We respectfully submit that there was an entire failure of proof in this regard.

Seymour vs. Freer, 75 U. S., 202-216.
Peugh vs. Davis, 96 U. S., 332.
Handy vs. Sibley, 46 O. S., 9-16.

We regard the contract of October 4, 1844, as incompetent to destroy petitioner's record title. This proposition we shall argue later. Certainly without this contract, the foreclosure suit, the sale therein and the master's deed did not release Butler's equity of redemption.

In *re the estate of Edwin Gilbert*, 104 N. Y., 200, 209, is an authority directly in point:

"Where the mortgage of a third person has been assigned by the mortgagee as collateral for his own

> debt, the foreclosure of the mortgage and purchase at the foreclosure sale by the assignee as against the assignor, where the latter is not made a party to the foreclosure and his equitable right foreclosed, simply substitutes the land for the mortgage and the assignee holds it as a security merely, subject to the right of the assignor to redeem by payment of the debt, and upon such payment he is entitled to the land."

In the above case, *Slee vs. Manhattan Co.*, 1 Paige, 48, and *Hoyt vs. Martense*, 16 N. Y., 231, were expressly approved, and *Bloomer vs. Sturges*, 58 N. Y., 168, criticizing these cases was limited in its effect and the authority of the former cases affirmed.

The circuit court of appeals held, *Slee vs. Manhattan, supra*, opposed to the decision in *Richards vs. Holmes*, 18 How., 143. Therein the bill was filed by a subsequent encumbrancer, who alleged that the sale under a trust deed was void for the reason that the beneficiary of the trust could not bid at the trustee's sale, and that the first mortgage continued subject to redemption. *The purchaser was not trustee for the party who sought to redeem*, and the case is clearly different from *Slee vs. Manhattan* and the case at bar.

We respectfully submit that this Honorable Court, by its decision in *Richards vs. Holmes*, meant to make this distinction perfectly clear, by the following language used in the course of its opinion at page 148:

> "We do not deem it necessary to examine the numerous and somewhat conflicting decisions upon the subject of by-bidding, *or bidding by persons standing in fiduciary capacities. This case stands clear of those decisions and of the principles upon which they rest.*"

We respectfully submit that as between Butler and Anderson the foreclosure proceedings effected no change in their relations as originally established, the land being simply substituted as collateral security in place of the notes and mortgage, and remained subject to redemption.

"The foreclosure of a mortgage by the party holding the same as collateral for the debt of a third person, does not as respects himself and the party placing it in his hands, necessarily operate as a payment of the debt for which it was thus pledged. Such foreclosure is only one step in the process required to render available the pledge. The property, as well after foreclosure as before, was equally held in trust for the benefit of both pledgor and pledgee, and was to be disposed of for the benefit of all parties. On the one hand the assignee, who held the same as collateral security, was not, in consequence of the foreclosure, required to take the land in payment, if he was ready and willing to proceed to reduce the same to cash by a fair and proper sale of the same; nor, on the other hand, would he be permitted to retain the same in his own right exclusively, regardless of what would be for the interest of the assignor. The property was holden in trust, first to pay the debt for which it was pledged, and, after enough had been realized to pay this debt, the pledgee was to hold the surplus for the benefit of the pledgor. It continued thus to be holden after the foreclosure. The foreclosure of the mortgage of the assignor was no more a payment of the debt to the pledgee than the assignment of the mortgage."

Brown vs. Tyler, 8 Gray, 135-139.

Stevens vs. Dedham Sav. Inst., 129 Mass., 547, 549.

Smith vs. Cremer, 71 Ill., 185.

Blood vs. Shepard, 69 Kan., 752.

Rice vs. Dillingham, 73 Me., 59.

In re Estate of Gilbert, 104 N. Y., 200.

Butler's Equity of Redemption Not Released by the Contract of October 4, 1844.

The circuit court of appeals (Tr., 74), (146 Fed., 935), in discussing this contract say, "it was not stated that the expected deed should be affected by a trust," and therefore concluded that it was not the subject of one. It seems

to us that because it was not affirmatively so stated, required an opposite conclusion.

In *Villa vs. Rodriquez*, 12 Wall., 323-339, this court declared that the law upon the subject of the right to redeem, where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled, saying:

> "It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and *that he paid for the property what it was worth.* * * * * Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instrument employed is immaterial. *That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence.*"

And in *Peugh vs. Davis*, 96 U. S., 332, this court declared that a subsequent release of an equity of redemption must appear by a writing importing in terms a transfer of the pledgor's interest, or such facts be shown as will estop him from asserting any interest in the premises, and that such release must be for an adequate consideration. Further, that in determining whether a transaction was intended to operate as such release, the value of the property, the fact that the pledgor retained possession and afterward improved and dealt with the property as his own, and any other like circumstances are strong evidence to show that a release was not intended.

It is, therefore, important to note that Butler was at all times in possession and continued in the possession of the property, and paid all of the taxes and assessments thereon. (Tr., 560, 534-549.)

The contract recites that Anderson, at the request of Butler and in consideration of Butler's covenant, is willing to surrender to Butler the Bissell bond and mortgage and certain railroad stock theretofore assigned by Butler to Anderson as collateral security for the payment of Butler's $20,000.00 note, "so far as the same may be done without prejudice or injury to the order obtained for the sale of the said premises and the rights of Anderson under the same, and without prejudice to the personal liability of Butler to Anderson on the principal debt."

We respectfully submit that the only right acquired by Anderson under the order of sale was the foreclosure of Bissell's equity of redemption. This the contract recognized and preserved, but otherwise its purpose and effect were to leave the rights of Butler and Anderson unchanged. Butler was to pay his debt and Anderson was to hold the title to the Bissell property as security therefor, with authority vested in Butler, at his discretion, to sell the railroad stock and adjust and release Bissell's personal liability, accounting for and paying over to Anderson any proceeds derived from either source.

The redelivery of the collateral securities was only to facilitate realizing thereon for Anderson's benefit, and did not affect his title thereto.

2 Colebrooke on Collateral Securities, Sec. 11.

It nowhere appears that anything was paid Butler for the property, or that he received any part of the proceeds of the master's sale by way of credit on his note.

If the sale of this property by the master is to be treated as valid, then on October 1, 1852, the date an account was stated between Charles Butler and Anderson's executors and trustees, Butler should have had credit as a payment upon his note for $6,921.00, the amount bid for this property by Anderson, and the further sum of $3,322.00, be-

ing the interest thereon from September 24, 1844, making the total amount for which Butler should have received credit at the date of said settlement of over $10,243.00, which would have left the balance then owing by him to Anderson's estate $3,757.00 instead of $14,000.00, shown by account stated. (Tr., 527, 528.)

We respectfully submit that the circuit court of appeals in its first decision committed mathematical and legal error with respect to the payment of this debt. In its later decisions it declared itself without power to relieve itself or the parties from the effects of this manifest error, a matter which we shall discuss later. However this may be, the power of the Honorable the Supreme Court of the United States is not thus limited.

VII.

ERRORS IN THE ADMISSION OF EVIDENCE.

The last trial herein was had upon amended pleadings, and thereby new issues of fact and new questions of law were raised and presented to the circuit court for its consideration and determination, and thereafter, upon writ of error to the circuit court of appeals; and the rulings and decisions of the lower courts thereon, are now before this court for review.

For the several reasons specified at length in the record, at the pages noted in the following summary, objection was made and exception entered to the competency of the following evidence offered by respondent.

In Chief.

(Assignments of Error I, Secs. 1 to 11, inclusive.)

1. The foreclosure proceedings entitled, Henry Anderson vs. Bissell, et al. (Tr., 308, 309, 310, 311.)

2. Deed of the master commissioner (Tr. 310, 367).

3. The will of Henry Anderson (Tr. 312-316).

In Rebuttal.

(Assignments of Error III, Secs. 1, 2, 3, 5, 7, 8, 9, 10.)

4. The contract of October 4, 1844 (Tr., 553).

5. The several agreements between Charles Butler and William and James H. Anderson (Tr., 561, 564-566).

6. Certain letters from Mr. Butler to Mr. Goodman, dated as follows:

February 25, 1860 (Tr., 551).

March 2, 1860 (Tr., 550).

March 19, 1860 (Tr., 560).

May 7, 1860 (Tr., 557-558)

and letter from Mr. Butler to James H. Anderson, dated July 28, 1858 (Tr., 567).

It certainly will not be seriously claimed that the former decisions of the circuit court of appeals in this case, an action at law, deprived your petitioner, the defendant below, of the right to seasonably object and except to the introduction of any incompetent evidence offered upon the last trial.

If this were so, no reason would have existed why the circuit court of appeals should have awarded a new trial, and by each of its former judgments have remanded the case to the circuit court "for proceedings in conformity with the opinion of this court, right and justice and the laws of the United States." Any such rule would render the right to trial by jury an idle ceremony, and would reflect small credit upon the administration of justice in an enlightened age.

Petitioner's Record Title was Destroyed by Incompetent Evidence.

As Mr. Butler was not served with process, and did not in any wise appear in the foreclosure proceedings, we respectfully submit that evidence thereof, and of the master's deed therein, was incompetent, and that the circuit court erred in admitting this evidence over plaintiff's objection and exception, and that the circuit court of appeals erred in affirming the judgment of the trial court.

The contract of October 4, 1844, and the several agreements and letters offered and received in evidence, were each and all unknown to Butler's grantees and to petitioner, who were successively in possession and claiming to be the owners of the Toledo property under duly recorded

titles. There is no evidence whatever showing that they, or any of them, had any knowledge or notice, of any kind, of any of these contracts or letters, and why should petitioner and those under whom he claims, who purchased the premises in controversy from Butler, and acquired their titles for full value, and in good faith and reliance upon the public records,—concern themselves with respect to these private contracts and letters, or any other of the unrecorded dealings and transactions between Butler and Anderson.

All such evidence, including the foreclosure proceedings and master's deed was wholly incompetent for any purpose except upon the theory that upon the date of these transactions and of the several contracts and letters, respectively, Butler was in possession of the property as mortgagee, and then only as explanatory of such possession, or of the title Butler was claiming by virtue thereof. Certainly all evidence of this class was clearly incompetent to sustain or destroy the record title to the premises in controversy.

> "The declarations of a party when in possession of land are, as against those claiming under him, competent evidence to show the character of his possession and the title by which he held it, but not to sustain or destroy the record title."
>
> Dodge vs. Freedman's, &c., Co., 93 U. S., 379.
>
> Harvey vs. Gardner, 41 O. S., 642, 658.
>
> Stone vs. O'Brien, 7 Colo., 456.

> "In certain cases the declarations of a party *in possession* are admissible, in evidence against the party making them or his privies in blood and estate. But such declarations are never competent as evidence to attack or destroy the title which is of record."
>
> Gibney vs. Marchay, 34 N. Y., 301.

This case was recently expressly approved and followed:

> "Parol declarations or admissions, since they can not confer or divest title, are not admissible as evidence of title either to sustain the burden of proof of title or to rebut *prima facie* evidence, but only to show the nature and extent of the possession and the character and quality of the claim of title under which the property was held, or other material facts resting *in pais*. * * *
>
> "Not infrequently has this court asserted that a party cannot make title to land by parol admission of his adversary, nor be deprived of title by the declarations of his adversary's predecessor in title." (Citing *Terry vs. Chandler*, 16 N. Y., 354-358, and other cases.)
>
> People vs. Holmes, 166 N. Y. (1901), 540-546.

Such declarations cannot be used as evidence of title at all. They are only evidence of the grounds on which possession is claimed.

> Wharton's Law of Evidence, 1156 *et seq.*
>
> Morring vs. McBride, 62 Tex., 309.
>
> Roebke vs. Andrews, 26 Wis., 311.

> "In certain cases the successor in title to real property may be charged with the admissions of his predecessor which qualify or limit his rights in respect to such property, but testimony of this character should not be received to contradict the terms of written instruments, as, for example, to vary the tenor of a deed or destroy the record title."
>
> 1 Jones on Evidence, 1st Ed., Sec. 242; 2nd Ed., Sec. 241, p. 306.

We respectfully submit that each of the lower courts erred in admitting each and all of the foregoing documents.

VIII.

CHARLES BUTLER PAID HIS DEBT IN FULL.

The circuit court, by its first judgment (Tr., 10) found "the issues of the cause with the defendant," the petitioner herein. One of the most important issues considered and decided by the court was whether the debt of Charles Butler to Henry Anderson was paid. The finding of the circuit court upon this issue in favor of your petitioner was considered by the circuit court of appeals in its first opinion (Tr., 88, 89) (146 Fed., 948-949), from which we quote as follows:

> "The second question is whether the transactions between the trustees and Butler were such as to raise an equity in his favor which, being transmitted to the defendant, entitles him to retain the possession of the land as against the plaintiff's legal title. For if the defendant has an equity which thus entitles him, the plaintiff cannot recover. It was so held in *Cincinnati vs. White*, 6 Peters, 431. To the same effect is *Dickerson vs. Colgrove*, 100 U. S., 582. But we are unable to discover any grounds on which it could be claimed that any equity was created for Butler by his transactions with the trustees." * * *
>
> "The money which he paid to them, as trustees, upon his note was not much, if any, more than was sufficient to pay it after crediting him with the proceeds of the master's sale."

We respectfully submit that in some way the circuit court of appeals was led into a mathematical error with respect to the payments made by Butler upon his indebtedness, and notwithstanding the clear state of the record in this regard, reached the conclusion that same was not paid, even after crediting Butler with the proceeds of the master's sale. The court, of course, concedes that Henry Anderson

was not entitled to take the property without paying Butler at least the amount bid therefor, but through inadvertence assumed that such payment was made.

The same proof with respect to payments made by Butler was offered in evidence and relied upon by petitioner on each trial of this case in the circuit court. The facts found by the court upon the first trial, by the jury upon the second trial, and shown by the record of the third trial, were successively urged upon the circuit court of appeals for consideration, upon each hearing therein, but upon the second and third hearings, respectively, the court declined to reconsider them. (Tr., 254-255.) (158 Fed., 252.) (Tr., 616.) (171 Fed., 789.)

We respectfully submit that this was error, and that no rule of law could impair, defeat or bar the right of any court to correct a mistake of such a character, since all courts must necessarily possess the power to cause their own records to speak the truth. (Assignments of Error II, IV, V, Sec. 1 to 4 inclusive.)

Storey vs. Livingstone, 13 Peters, 359-373.
Railroad Company vs. Soutter, 2 Wall., 510.
Ex Parte Marx, 136 Fed., 168 (C. C. A., 9th Cir.).
Rousset vs. Boyle, 45 Calif., 64-69.

The inherent power of courts, to revise and correct mathematical errors at any time was declared by the circuit court of appeals for the sixth circuit in *Odell vs. Reynolds*, 70 Fed., 656, opinion per Severens, J., approved in *Gagnon vs. United States*, 193 U. S., 451, 458.

Certainly it will not be contended that this court does not possess the power to correct such an error on the part of the lower courts.

Payments by Butler.

We respectfully submit that the undisputed written evidence and admissions of counsel for respondent, which we summarize below, establish beyond question that by October 30, 1855, and admittedly within the life of the trust created by Anderson's will, Butler, without receiving any credit or allowance whatsoever for his Toledo property, paid Anderson's executors the full amount of his debt, with interest, and it seems most unjust that those claiming under Anderson should be permitted to deprive petitioner of property acquired in reliance upon Butler's title.

CHARLES BUTLER,

IN ACCOUNT WITH THE ESTATE OF HENRY ANDERSON.

Dr.

July 1, 1841—To note of this date	$20,000.00
Oct. 1, 1852—Int. to date, 11 yrs. 3 mos., 6%	$13,500.00
Total Dr.	$33,500.00

Cr.

June 1, 1848—		
By commissions	$5,967.49	
Int. to Oct. 1, '52, 4 yrs. 4 mos.	1,551.42	
June 1, 1852—		
By ½ of acct. ($624.31)	312.15	
Int. to Oct. 1, '52, 4 mos.	6.24	
	$7,837.30	
Less ½ of coms. refunded on sales cancelled and int.	312.24	
		$7,525.06

Oct. 1, 1849—			
By cash paid	$3,376.52		
Int. to Oct. 1, '52, 3 yrs.	607.86		
		$3,984.38	
Oct. 1, 1850—			
By cash paid	$2,700.00		
Int. to Oct. 1, '52, 2 yrs.	324.00		
		3,024.00	
Oct. 1, 1851—			
By cash paid	$3,110.00		
Int. to Oct. 1, '52, 1 yr.	186.00		
		3,296.60	
			$17,830.04
Leaving due Oct. 1, 18 52, as per acct. stated (Tr., 527.)			$15,669.96
Oct. 1, 1852—			
By cash (Tr., 528)			1,669.96
Oct. 1, 1852—			
Balance due after deducting payment of this date			$14,000.00

The foregoing is a copy of an account stated (and receipt thereon), (Tr., 527-528), dated October 1, 1852, signed by Butler, and Goolman, one of Anderson's executors and trustees, and thereby it is shown that Butler never received anything whatever from Anderson or from his representatives for his Toledo property, and it is perfectly clear that had credit been allowed to Butler for the sum of $6,921.00 bid by Anderson for this property at the master's sale, Butler would have been entitled to an additional credit

upon the settlement between him and Anderson's executors on October 1, 1852, of over $10,000.00, and the balance then due to the estate from Butler would have been less than $4,000.00 instead of $14,000.00.

Oct. 1, 1852—Balance due (see account stated)		$14,000.00
Oct. 1, 1853—Int. to this date, 1 yr.		840.00
		$14,840.00
Oct. 1, 1853—By note therein agreed to be credited as of this date (Tr., 528)		7,340.00
Balance due Oct. 1, 1853		$ 7,500.00
Apr. 20, 1855—Int. to this date, 1 yr. 6 mos. 19 da.		698.75
		$ 8,198.75
Apr. 20, 1855—By cash (9th report, Tr., 528)		3,000.00
		$ 5,198.75
Int. to Oct. 30, 1855, 6 mos., 10 da.		164.62
		$ 5,363.37
Amount overpaid		4.23
		$ 5,367.60
Oct. 30, 1855—		
By cash (10th report, Tr., 528)	$4,340.00	
Oct. 30, 1855—		
By cash (10th report, Tr., 528)	1,027.60	
		$5,367.60

The agreement in the note dated October 1, 1853 (Tr., 528) gave Charles Butler the right to have the amount of this note endorsed at its date upon his note for $20,000.00 and such application, with the other clear proof

of payments, established the payment of the full amount of the original note within the life of the trust.

The rule in simple contracts is well settled that to give a note for a prior obligation is no discharge of the original agreement unless the new note be paid, *or unless it was the understanding of the parties* that the new note should extinguish the original obligation.

McNaughton vs. Partridge, 11 Ohio, 222.

Weller Co. vs. Gordon, 14 C. D., 24; C. C. R., 407.

Affirmed without report, 70 O. S., 489.

Merrick vs. Boury, 4 O. S., 60.

Wheeler vs. Faurot, 37 O. S., 26-29.

The production of this note duly endorsed was *prima facie* proof of its payment; and the Transcript furnishes additional evidence which we think, in any view, established the payment of the note in full with interest thereon at seven per cent. per annum.

It may be that the note for $7,340.00 was not paid for some time after it was given, but its payment in full is shown by the Transcript, 571, as follows:

January 1, 1857	$4,000.00
May 7, 1860	2,041.00
August 9, 1860	500.00
February 1, 1861	2,419.49
March 8, 1861	2,172.70
Total	$11,133.19

We respectfully submit the following computation showing payment of note for $7,340.00:

Oct. 1, 1853—To note of this date (Tr., 295-296)	$7,340.00
Jan. 1, 1857—Int. to date, 3 yrs. 3 mos. 7%	1,669.85
	$9,009.85

Jan. 1, 1857—By cash (Tr., 343)	4,000.00
Balance	$5,009.85
May 7, 1860—To Int. to date, 3 yrs. 4 mos. 6 da., 7%	1,174.60
	$6,184.45
May 7, 1860—By cash (Tr., 343)	2,041.00
Balance	$4,143.45
Aug. 9, 1860—To Int. to date, 92 da., 7%	72.61
	$4,216.06
Aug. 9, 1860—By cash (Tr., 343)	500.00
Balance	$3,716.06
Feb. 1, 1861—To Int. to date, 5 mos. 23 da., 7%	127.02
	$3,843.08
Feb. 1, 1861—By cash (Tr., 343)	2,419.49
Balance	$1,423.59
Mar. 8, 1861—To Int. to date, 1 mo. 7 da., 7%	10.24
	$1,433.83
Mar. 8, 1861—By cash (Tr., 343)	2,172.70
Overpaid	$ 738.87

To avoid possibility of dispute, the foregoing computation is based upon seven per cent. interest.

The Transcript shows beyond controversy that Butler paid his note for $20,000.00 in full, with interest, the aggregate amount paid by him to October, 1855, being as follows:

Paid (see account stated Tr., 527)	$17,830.04
Paid (see receipt, Tr., 527)	1,669.96
Paid (see note, Tr., 528)	7,340.00
Paid as per 9th report (Tr., 528)	3,000.00
Paid as per 10th report (Tr., 528)	4,340.00
Paid as per 10th report (Tr., 528)	1,027.60
Total	$35,207.60
And if we deduct therefrom the principal of the note of Oct. 1, 1853 (Tr., 528)	7,340.00
And as shown above after October, 1855, Butler paid to the executors and to James H. Anderson $11,133.19 in cash, in full payment of his note for $7,340.00, and $3,793.19 interest thereon at 7%	11,133.19
Making the total amount paid by Butler in cash	$39,000.79

—all paid to secure the release and discharge of Anderson's claim and lien against Butler's property.

The original $20,000.00 note of Charles Butler was not produced by respondent, nor did he offer any evidence tending to explain his failure so to do.

As we have shown above, the defendant below, the petitioner herein, produced from Butler's papers and offered in evidence the original note dated October 1, 1853, for $7,340.00, same being endorsed in blank by the executors and trustees of the estate of Henry Anderson, deceased. (Tr., 528.)

The production of this note thus endorsed, was at least *prima facie* evidence of payment, and certainly raised the presumption that it was paid.

We submit that it was the duty of the trial court either to give effect to the agreement embodied in this note

to credit and apply same as a payment at its date, October 1, 1853, upon the old note of $20,000.00, or submit the question to the jury under proper instructions. Had such application been made, the undisputed evidence established the payment in full of the original indebtedness evidenced by the $20,000.00 note, and with equal clearness showed that neither Henry Anderson nor his estate ever paid anything whatever for Butler's valuable Toledo property, admittedly first acquired by Henry Anderson, in trust as collateral security for the payment of Butler's $20,000.00 note.

Upon the state and federal authorities, if there was conflict in the evidence with respect to payment, it should have been submitted to the jury.

Lyman vs. Bank, 12 How., 225-243.
Gaines vs. Miller, 111 U. S., 395, 399.
Larimore vs. Wells, 29 O. S., 13.
Chase vs. Brundage, 58 O. S., 517-526.
3 Elliott on Evidence, Secs. 2577, 2578.

The questions raised with respect to the trust estate were on the last trial herein based upon evidence voluntarily produced by respondent, and it shocks the conscience and violates principles of common sense and justice to permit him to recover the premises in controversy, as devisee under the will of Henry Anderson, when by such clear proof, it is shown that the property was held in trust by Anderson for Butler, to secure a debt every dollar of which has been paid.

The evidence offered by respondent is in substance that James H. Anderson acquired whatever estate he may have had in the premises in controversy under the will of Henry Anderson; that this estate was, *by reason of transactions*

between Henry Anderson and Charles Butler, burdened with a trust in favor of Butler; and it is difficult to understand why respondent, *also claiming under the will of Henry Anderson,* would not have acquired any interest claimed by respondent in the property, burdened with the same trust.

The agreements with the sons were made in 1849, 1851 and 1852, respectively, when the trust was in full force and effect, and these agreements expressly provided that payment of Butler's indebtedness was to be made to the executors; and necessarily therefore, these contracts were made primarily for the benefit of the estate, which was then unsettled. No new indebtedness was created by, or referred to in, any of these agreements, all of which relate only to a prior existing indebtedness secured against specified property held in trust.

By the last agreement with James H. Anderson, exact dates were fixed for the payment by Butler to the executors and trustees of the balance of the indebtedness and the consequent discharge of the trust; and the proof shows, proper credit being given for the note of $7,340.00, that Butler made all of these payments by some time in October, 1855, a date *admittedly within the life of the trust.*

The evidence conclusively negatives the theory that Butler was dealing or dealt with either of the sons with respect to a mortgage on his life estate.

It was not until 1856, and when James H. Anderson had reached the age of twenty-five years, that the executors and trustees turned over to him the claim of the estate against Butler, which the evidence, we submit, shows then consisted of the note for $7,340.00 and accrued interest thereon, and nothing more.

It fairly appears, we think, that the executors and trustees, at a date not later than 1856, transferred to James H. Anderson, who survived his brother William,

the note for $7,340.00; and thereby James H. Anderson also acquired the right to the security for the payment of said note.

Carpenter vs. Longan, 83 U. S. (16 Wall.), 271-275.

Kernohan vs. Manss, 53 O. S., 118-133.

It will, no doubt, be claimed by counsel for respondent that the evidence concerning payments made by Mr. Butler is in dispute, but certainly this should not have defeated petitioner's right to have had this important question submitted to the jury. We respectfully submit that the circuit court, upon the last trial, erred in failing so to do, in directing a verdict, and in entering judgment against petitioner, and that the circuit court of appeals erred in affirming the rulings and judgment below.

IX.

WHEN BUTLER PAID HIS INDEBTEDNESS IT WAS THE DUTY OF ANDERSON'S TRUSTEES TO EXECUTE AND DELIVER DEED TO HIM.

The will of Henry Anderson (Tr., 312) gave and devised to the trustees all of his property "and all claims and demands, whatsoever," except claims of testator as one of the agents of the American Land Company, and further provided:

> "I wish them (the trustees) to collect debts due to me." * * * "They shall have full power to make titles for property sold and to pay charges for preservation, and in all respects to have the powers of owners, but always as trustees."

Under the will we respectfully submit that the trustees, who were also executors, had the power, and that it became their duty to fully investigate and determine the amount due upon Butler's note, and to settle any controversy which may then have existed concerning the note or the security held therefor. In the discharge of their duties, therefore, it was necessary for them to fully inform themselves, and decide whether or not there was a credit to be allowed upon the note from the sale of the Toledo property by the master commissioner.

With full opportunity for learning the facts the trustees, in the exercise of their best judgment, within the life of the trust, determined that no such credit was to be allowed because Henry Anderson had acquired and held the Toledo property in trust, as security for the debt evidenced by this note. That the trustees reached these conclusions is, we respectfully submit, clearly shown:

1st. By the signed statement of account concerning the note, dated October 1, 1852 (Tr., 527-528); and

2nd. By the recital in the deed from the trustees to Butler (Tr., 530):

> "It being understood that the above described premises were conveyed to Henry Anderson in fee and held by him in his lifetime as a mortgage to secure the payment of a certain sum of money due from Charles Butler to Henry Anderson."

We respectfully submit that the trustees had the power to do just what they did concerning the note and the land, and that upon the payment of the debt they only discharged their plain duty by deeding the property to Charles Butler.

2 Pomeroy's Eq. Jurisprudence, Sec. 1065.

The deed of the trustees, dated October 1, 1885, was duly recorded May 2, 1860, in the record of deeds of Lucas County, Ohio (Tr., 528-531), and thereafter Calvin Bronson and your petitioner, successively, acquired title to the property thereby conveyed to Charles Butler, for full value, in good faith, in reliance upon the validity thereof, and without knowledge or notice of any kind of any defect therein.

The Deed of the Trustees Conveyed the Legal Title.

The consideration named in this deed is one dollar (and other valuable consideration) and though nominal, is in law sufficient to support the legal conveyance, and the legal title having passed thereby the deed could only be avoided, if at all, by bill in chancery at the suit of the beneficiaries of the property.

Newton vs. Mahoning County, 26 O. S., 616-628.

The recital of such considerations paid was presumptive evidence of a consideration sufficient to support the conveyance, and cast the burden of proof on respondent, to produce competent evidence impeaching the deed, and we respectfully submit that no such evidence was offered.

> "A deed to real property cannot be invalidated by parol evidence showing that there was no consideration for its execution, when it contains a recital that a consideration had been received by the grantors."
>
> Finlayson vs. Finlayson, 17 Ore., 347.
> Jones on Real Property, Sec. 309.
> 3 Washburn on Real Property, p. 401.
> 2 Tiffany on Real Property, Sec. 384.

And the rule is the same although the grantors of the deed were executors and trustees.

In *Norman vs. Towne*, 130 Mass., 52, it was claimed that the trustee had wrongfully conveyed the land and misappropriated the trust funds and that subsequent purchasers were charged with notice by the nominal consideration recited in the deed.

The court say:

> "Land was conveyed, by a deed duly recorded, to a person in trust, with power to sell the estate, provided it be for the benefit of the *cestui que* trust so to do, and to reinvest the proceeds. The trustee made a deed, purporting to convey the land, in consideration of one dollar, and other valuable considerations, his grantee mortgaged the land and re-conveyed it to the trustee, subject to the mortgage, and the mortgagee, after these deeds were recorded, assigned the mortgage. Held—that the recital in the deed from the trustee was not sufficient notice to the assignee that the trustee was not acting in accordance with the power conferred upon him."
>
> Norman vs. Towne, 130 Mass., 52.

X.

DISREGARD OF OHIO STATUTES AND OF PRESUMPTIVE EVIDENCE DEFEATED PETITIONER'S RIGHT OF TRIAL BY JURY.

We respectfully submit that the circuit court, upon the last trial herein, erred in granting respondent's motion for a verdict in his favor, in directing such verdict and in entering judgment thereon (Tr., 300-301) against the objection and exception of petitioner and that the circuit court of appeals erred in affirming said ruling and judgment. (Assignment of Errors IV, Secs. 1, 2, 3 and V, Secs. 1 and 4 inclusive.)

Petitioner offered in evidence a duly certified copy of deed (Tr., 528-531) from the executors and trustees of Henry Anderson, duly executed and acknowledged, and dated October 9, 1855, with evidence of the record thereof in the public land records of Lucas County, Ohio, May 2, 1860, conveying title to the property in controversy herein to Charles Butler, under whom grantor claims said property. This evidence was received by the court but was not submitted to the jury.

We respectfully submit that the certified copy of this deed, with evidence of its record, was competent evidence in favor of petitioner, and was *prima facie* evidence of its delivery to Charles Butler at its date, October 9, 1855, and that said deed, with all the other evidence relating thereto, should, therefore, have been submitted to the jury, and that said court erred in failing so to do.

By Section 4143 of the Revised Statutes of Ohio, now Section 8557 General Code, continuously in effect since 1831 (29 O. L., 349; Swan's Ohio Statutes, p 267; *Burnet vs. Brush*, 6 Ohio, 32), it is provided:

"A copy of the record of a deed * * * duly certified by the County Recorder with his official seal affixed thereto, *shall* be received in all courts and places within this state, as *prima facie* evidence of the existence of such instrument and as conclusive evidence of the existence of such record * * *."

The supreme court of Ohio in *Lessee of Mitchell vs. Ryan*, 3 O. S., 377-380 (opinion per Thurman, J.), says:

"The decision of this case depends upon the question whether the recorded instrument, purporting to be a deed from Owen Shanon and wife to Ellen Shanon, was ever, in contemplation of law, delivered.

"As the statute provides that copies from the records of deeds duly certified by the recorder, and under his official seal, 'shall be received in all courts and places within this state, as *prima facie* evidence of the existence of such deeds,' it is very clear that the record of a deed is *prima facie* evidence of its delivery, since, without delivery, it cannot exist as a deed. * * * The burden of proof that a recorded deed was not delivered rests upon the party attacking it."

In *Leonard vs. Fleming*, 13 North Dakota, 629 (1905), the court had under consideration a statute of North Dakota, which provided that a grant duly executed is presumed to be delivered at its date, and that the presumption is that the deed is truly dated.

At page 634 in its opinion the court say:

"These statutory provisions are declaratory of what was the law before they were enacted. It may be stated as a general rule, that *prima facie* all documents must be taken to have been made on the day they bear date. * * So a deed is presumed to have been executed (*Anderson vs. Weston*, 6 Bing. N. C. Eng., 296-300), and delivered on the day it is dated. Best on Presumption, Sec. 133, p. 181; Jones on Evidence, Sec. 45; *Ward vs. Dougherty*, 75 Calif., 240."

The authorities uniformly support the proposition that the date of a deed is *prima facie* evidence of its delivery at such date, and that the deed is presumed to have been then delivered.

Lilienthal's Tobacco vs. U. S., 97 U. S., 237-268.

Crane vs. The Lessee, Etc., 6 Peters, 598 (U. S.).

Spurr vs. United States, 87 Fed., 701.

Ward vs. Doughterty, 75 Cal., 240.

Inman vs. Swearinger, 198 Ill., 437.

McGee vs. Allison, 94 Iowa, 527.

Ford vs. Gregory, 10 B. Monroe (Ky.), 175-180.

Conley vs. Finn, 171 Mass., 70.

Hathaway vs. Cass, 84 Minn., 192.

Atlantic City vs. New Auditorium Co., 63 N. J. Eq., 644, 667.

People vs. Snyder, 41 N. Y., 397-402.

Kendrick vs. Dillinger, 117 N. C., 491.

Harmon vs. Oberdorfer, 33 Gratt., 497-501 (Va.).

Pringle vs. Dunn, 37 Wis., 449.

Best on Presumptions, Sec. 133, p 181.

In *Crane vs. The Lessee of Henry Gage Morris*, 6 Peters, 598, this question was under consideration, and it was held:

> "When *prima facie* or presumptive proof has been made, its character, as such, ought not to be disregarded, and the court has not a right to direct the jury to view it otherwise than in the aspect in which it is presented."

The question in this case was with respect to the time of the delivery of a certain deed. In the course of the opinion, at page 620, the court, considering the effect to be

given to presumptions, when testimony to rebut them is offered (italics ours), say:

> "The only question was whether the defendant had a right to insist upon shutting out from a consideration of the jury the nature of the evidence, as *prima facie* proof or otherwise, and to prescribe the order and manner in which it should be examined and weighed by them. We know of no principle of law upon which such a claim can be maintained. Whenever evidence is offered to the jury which is in its nature *prima facie* proof, or presumptive proof, its character, as such, ought not to be disregarded, *and no court has a right to direct the jury to disregard it, or view it under a different aspect from that in which it is actually presented to them.* Whatever just influence it may derive from that character, the jury have a right to give it; and in regard to the order in which they shall consider the evidence in a cause, and the manner in which they shall weigh it, the law has submitted it to them to decide for themselves, and any interference with this right would be an invasion of their privilege to respond to matters of fact."

This decision is quoted and approved in:

Lilienthal's Tobacco vs. United States, 97 U. S,. 237-268.

The Deed of the Executors and Trustees Was a Final and Complete Release.

Upon payment by Butler of his indebtedness to Anderson's estate, it certainly was entirely competent for the executors in October, 1855, to execute a release to him, and this instrument being in the form of a deed regularly appearing of record, proved upon the trial by certified copy, and not attacked on grounds of accident, mistake or fraud, and no competent evidence being offered to impeach this instrument, barred recovery of plaintiff below.

Stone vs. Vance, 6 Ohio, 246.
Wilson vs. Bailey, 1 Handy, 177.
Jackson vs. Ely, 57 O. S., 450-458.
Cassilly vs. Cassilly, 57 O. S., 582-592.

We further respectfully submit that the delivery of this deed at its date in October, 1855, within the life of the trust, having been established presumptively, that this instrument was also *prima facie* evidence of the payment of Butler's indebtedness, and of the regularity of all matters evidenced by such deed.

> "The authorities are clearly to the effect that acts done which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter."

> "By the general rule of evidence, presumptions are continually made in cases of private persons of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace, and the security of private property, indulges its own presumptions. It presumes that every man, in his private and official character, does his duty, until the contrary is proved; and it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption."
>
> Bank of U. S. vs. Dandridge, 12 Wheaton, 64-69.

> "The law will presume all to have been rightly done, unless the circumstances of the case overturn this presumption, and, consequently, as stated by the supreme court of the United States, in *Bank of U. S. vs. Dandridge*, 12 Wheat., 70, 'acts done which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter.'"
>
> Ward vs. Barrows, 2 O. S. 246.

If presumptive evidence establishing the delivery of a deed is met by competent rebutting evidence, it is for the jury to decide from all the evidence whether or not the presumption has been overcome.

Kendrick vs. Dillinger, 117 N. C., 491.
Hathaway vs. Cass, 84 Minn., 192.
1 Jones on Evidence, 2nd Ed., Sec. 104.

XI.

THE DEED OF THE EXECUTORS AND TRUSTEES WAS DELIVERED IN ESCROW IN OCTOBER, 1855, AND JUSTICE REQUIRES THAT IT BE GIVEN EFFECT FROM SAID DATE.

We respectfully submit that the circuit court of appeals erred in its first decision herein in holding that there was no competent evidence to show the delivery in escrow of the deed of the executors and trustees to Butler, dated Oct. 1, 1855. (Tr. 86-88. (Assignment of Errors. IV Secs. 1, 2, 3 and V Secs 1 to 4 inclusive).

On page 88, referirng thereto, it is said:

> "No account can be taken of the fact that the deeds were prepared in 1855. They had *no effect* (italics ours) until they were delivered in 1860. It is stated in the brief of counsel that they were in escrow in the meantime, but it is not one of the stipulated facts nor found by the court; nor indeed was there any competent evidence tending to prove such fact."

The evidence offered in this connection consisted of letters exchanged between Mr. Butler and both Mr. Goodman and Mr. Anderson, a series between the parties, furnishing the best evidence available at this late date, which we submit, should not have been disregarded.

Among the letters so offered, in the first record, we call attention to:

1. From Butler to Goodman, dated Feby. 25, 1860 (Tr. 53) in which he says:

> "The deed to me you will recollect is in Mr. Halstead's hands in escrow, deposited by you some years ago, and this I shall have to have delivered to me to enable me to make my warantee deed to Mr "Brunson" and now my dear sir you will see the

> importance of this matter to me and of your co-operation to enable me to close with Mr. "Brunson," and the sooner the better. * * * I want the deed as soon as I can get it, and this can only be delivered on your order."

Mr. Butler on the same day wrote a similar letter to J. H. Anderson (Tr., 50), in which the matter of the sale of the Toledo property was discussed in detail.

2. A letter from Goodman to Butler, dated March 19, 1860 (Tr. 52) shows that this letter from Butler to him, as well as the Anderson letter had been received, and no objection whatever was made to any statement or step proposed except the matter of interest.

3. A letter from Charles Butler to J. H. Anderson, dated May 7, 1860, (Tr. 52), shows that the sale to Mr. Bronson of the Toledo property had been concluded, enclosed a certificate of deposit for $2041.00, the *amount of the cash payment*, and then proceeds:

> "The security which I have taken from Mr. "Brunson" for the balance of the purchase money I will have duly assigned and placed in the hands of Mr. Halstead, of the Manhattan Bank, as stipulated, to your order."

This whole transaction having occurred quite half a century ago, it may well be presumed that some of the documents throwing light upon it are lost. Accordingly, this and other similar letters from the executors and trustees, as well as James H. Anderson, should, we submit, be taken to acquiesce in and to thus confirm the statements of Mr. Butler, and to show that the deed had been deposited in New York in such an appropriate way as to constitute an escrow within the design and acceptance of all parties.

Accordingly we claim that this deed of the executors and trustees to Charles Butler was delivered in escrow, in October, 1855, to Mr. Halstead of the Manhattan Bank of New York City, with appropriate instructions to deliver the same to Mr. Butler when he had paid the balance of his indebtedness. And that this deed was later on delivered to him, in accordance with such conditional deposit, the debt being satisfied by the payment of cash and the delivery of acceptable securities, and was later left for record in the office of the recorder of Lucas county, Ohio.

Under the facts shown and also safely presumed from the record, this deed clearly took effect from the date of its delivery in escrow.

> "If a deed is delivered to a third person as an escrow, it will take effect immediately on the performance of the condition; and if necessary for the purpose of protecting the grantee against intervening rights, will be held to take effect from the time of its delivery as an escrow."
>
> Shirley vs. Ayres, 14 Ohio, 307.

> "Where a grantor in a deed delivers the same to a third person *as his deed*, to be delivered to the grantee at the death of the grantor, and the deed is accordingly delivered to the grantee upon the grantor's death, the title passes to the grantee as of the date of the first delivery."
>
> Ball vs Foreman, 37 O. S., 132 (syl.)

The principle announced in this case would be the same if the power and authority of the executors and trustees expired before the final delivery of the deed.

The general doctrine that a deed takes effect from its first delivery in escrow is also supported by:

Pratt vs. Holman, 13 Vt., 530, 532.

Williams vs. Schatz, 42 O. S., 47, 51.

Regan vs. Howe, 121 Mass., 424-426.

Simpson vs McClathery, 52 Miss., 723.
Weber vs. Bank, 145 N. Y., 275-283.
Prewitt vs. Ashford, 90 Ala., 294-301.
Davis vs. Clark, 58 Kans., 100.
Owen vs. Williams, 114 Ind., 179.
Tharaldson vs. Everts, 87 Minn., 168.
Baker vs. Baker, 159 Ill., 394.
Landon vs. Brown, 160 Pa. St., 538.
Devlin on Deeds, Sec. 328.
3 Washburn Real Property, page 321, par. 44 and 45.
2 Jones on Real Property, Sec. 1234-1324

It has been insisted, in the courts below, that an escrow is prevented because of the statement in the letters to the effect that the deed was to be delivered only on the *order of* one of the executors and trustees. The claim being made that the *control of the deed* was not surrendered in the sense required to constitute an escrow.

This position under the circumstances of this case, we submit, is not well taken.

The letters do not pretend to recite all the details as to what was evidently understood to be an escrow. The language used shows a modification of the first agreement of deposit in the manner of payment was being considered. In effect Mr. Butler says:

> I can not make full payment *in money* now but I can pay some money and deliver securities for the balance. Are you willing to accept these securities in place of the money, and let me have the deed?

This change, and the final delivery, we respectfully submit, required nothing more than the ordinary assent thereto of the party or parties in whose interest the deed had been deposited. That it was referred to as an "order" or that the

envelope in which the deed was found appears to have been labeled as "the property of Walter Goodman, Peter Anderson, and to be delivered on the order of either of them" should not, at this late date, after the agreement has been executed and the property sold and conveyed to an innocent purchaser, be taken to destroy the equitable rights of Mr. Butler after his payments amounting to about $39,000.00 in reliance upon such escrow.

The order, so-called, was merely an appropriate form of direction to Mr. Halstead to proceed with the delivery of the deed as originally proposed, or, it was no more than a request of Mr. Butler for a sufficient notification to the depositary, possibly a stranger to the transaction, that payment had been made or secured, so that the delivery could be made at once. And in this way the depositary would be relieved from the responsibility of determining independently and for himself whether payment of both interest and principal (involving long calculations) had been fully made, as well as of passing on the securities offered.

The real and essential condition was the payment of the debt either in money or by aceptable securities. The consummation of the transaction as an escrow has an unmistakable meaning. The benefits were regarded as being mutual. It was based upon such an agreement as would be understood by business men to be an escrow.

From the fact that the deed was later duly recorded, the presumption arises, we respectfully submit, that the order of the executors and trustees for the delivery of the deed, if necessary thereto, was duly obtained.

In *Pratt vs. Holman*, 16 Vt., 530, on page 532 the court say:

> "The deed was delivered on such assurance as was satisfactory to the agent, who was authorized to deliver the same, and if the same was not paid, the defendant is liable therefor in a proper action."

"Where a deed is delivered after a certain proportion of the purchase price has been paid, the delivery relates back to the date of the contract of sale."

Krakow vs. Wille, 125 Wis., 284.
Connell vs. Connell, 32 W. Va., 319.

We submit the cases cited in this connection by the circuit court of appeals are based on facts quite different from ours and should be distinguished therefrom. Everything here goes to show the intention of the grantors was to deliver the deed upon the one usual condition of deeds in escrow—payment—and this being complied with, such a delivery was irrevocable without the consent of both parties.

It is elsewhere shown in this brief that Butler paid his debt in full (p. 105), and, therefore, he clearly had the right to demand the deed, and a court of equity, if its action had been invoked, would have required delivery.

In the second opinion of the circuit court of appeals (Tr. 255) the court cites, in rejecting the escrow,

James vs. Vanderheyden, 1 Paige, 385.
Cook vs. Brown, 34 N. H., 460.
Prutzman vs. Baker, 30 Wis., 644.

In the first, there is a definite written agreement showing the deed was to be held "during the joint pleasure" of the two parties thereto. (1 Paige, supra, 386.)

In the second case the question of the mental capacity of the grantor to make a deed and to a protege paying no valuable consideration therefor was involved. The theory of the court was, we submit, that the deed could be withdrawn at the pleasure of the grantor and remained in escrow upon no binding obligation. (34 N. H., supra, 460 et seq.)

In the third case the facts show that the grantor referring to the deeds directed the depositary to "keep them" but should not get them recorded while he lived; if he got well he wanted to control them." (30 Wis. supra 646.)

We further direct the attention of the court to the fact that on the last trial in the circuit court, of the case at bar, petitioner did not offer the correspondence or any other evidence relating to deposit of the deed of the trustees and executors, but offered a duly certified copy of the deed from the public records (Tr. 528-531), and relied upon the presumption of its delivery arising therefrom. In rebuttal respondent offered in evidence certain letters relating to the deed, (Tr. 550, 551, 560). This evidence was objected to by petitioner, and as argued above, it was, we respectfully submit, incompetent to affect or destroy petitioner's record title. If regarded as competent evidence it tended to show a delivery of the deed in escrow, and should, under proper instructions, have been submittd to the jury with all the other evidence relating to the deed. The record of the last tritl was quite different in this respect from each of the former records.

XII.

THE LEGAL TITLE TO THE TOLEDO PROPERTY WAS CONVEYED TO CHARLES BUTLER BY DEED FROM EDWARD BISSELL.

Dated February 22, 1843.
(Exhibit F) (Tr. 37.)

Assignment of Errors IV-V.

It apears from the evidence that at least from 1843 to 1860 Charles Butler was in the actual possession of the Toledo property, that he paid all the taxes and assessments thereon and claimed title thereto under the Bissell deed, (Tr. 37), and as he entered thereunder, petitioner, as Butler's grantee, is not estopped to set up this previous title in Butler.

Coakley vs. Perry, 3 O. S., 344.

Again, the possession of Butler was notice to Henry Anderson when he bought at the master's sale, of the rights of Butler in the land, and precluded Anderson from being a good faith purchaser. Although Butler held the legal title to the property, he was not served with process and did not appear in the foreclosure suit, and the proceedings could not affect Butler's legal title unless Henry Anderson was a good faith purchaser for a valuable consideration, without notice of Butler's title.

The statute of Ohio with respect to the recording of deeds in force at the time of these transactions was as follows:

> "8. Sect. VIII. That all other deeds and instruments of writing, for the conveyance or incumbrance of any lands, tenements or hereditaments, executed agreeably to the foregoing provisions, shall be so recorded within six months from the date thereof; and if such deed or other instrument of writing, shall not be so recorded, within the time

herein prescribed, the same shall be deemed fraudulent, so far as relates to any subsequent *bona fide* purchaser, having, at the time of making such purchase, no knowledge of the existence of such former deed or other instrument of writing; provided, that such deed or other instrument of writing may be recorded after the expiration of the time herein prescribed, and from the date of such record, shall be notice to any subsequent purchaser."

Swan's Statutes of Ohio, 1841, pp. 267-8.

Swan & Critchfield's Statutes of Ohio, in force August 1, 1860, p. 467.

Under this statute the Bissell deed was just as good off record as on record against every one except a good faith purchaser.

"By the execution of a deed according to the forms of law, the title of the grantor to the lands conveyed becomes vested in the grantee, whether the deed is recorded or not, and is good against all the world except subsequent purchasers, without notice."

Irvin vs. Smith, 17 Ohio, 226.

Under the Ohio statute as decided in *Irvin vs. Smith, supra*, the legal title vested in Butler by the Bissell deed and remained in him, unless, as we have said, Henry Anderson was a good faith purchaser of the land at the master's sale, that is that he paid a valuable consideration for the conveyance without any notice or knowledge of the existence of the Bissell deed.

The Evidence Shows No Consideration Paid by Henry Anderson for Deed from Master Commissioner.

We have already shown that the executors and trustees (Tr. 527) charged Butler with the full face of the $20,000.00 note, and interest from its date, without any deduction or credit for the Toledo land, or otherwise, and

we respectfully submit that this is an admission that no consideration was in fact paid by Henry Anderson for the masters' deed, which takes away one of the essential elemends of a good faith purchaser.

Since it was the duty of the executors to settle, collect and receipt the notes and claims due the estate, and this settlement, receipt and admission were made in the necessary discharge of their duties, it is evidence against all persons interested in the estate of Henry Anderson, including respondent, and as it did not appear that Henry Anderson purchased the land at the master's sale for a valuable consideration, and without notice of the deed to Butler, the legal title remained in Butler.

Therefore the question presented to the trustees was getting the title out of Butler and not into him.

We submit that Henry Anderson was charged with and admitted notice and knowledge of Butler's deed by his naming Butler as a party defendant in the foreclosure proceedings and praying to bar and foreclose him of all right in the premises.

> "Notice to a purchaser of property *of the existence of liens or encumbrances* thereon is sufficient, in the absence of explanation, to charge him with notice of any and all liens or encumbrances which an inquiry would have disclosed. It is not necessary in such a case to show actual notice of the particular instrument creating a lien to deprive him of the character of a bona fide purchaser."
>
> Reed vs. Gannon, 50 N. Y., 345-349-350.

The possession of Butler charged Anderson and the whole world with notice of Butler's rights.

> "A purchaser of land in the actual possession of a third party, is chargeable with notice of any equitable title of the party in possession, whatever the same may prove to be."
>
> McKinzie vs. Perrill, 15 O. S., 162.

> "A purchaser of land in possession of a third person is chargeable with notice of the occupant's title and equities."
>
> Kelley vs. Stanbery, 13 Ohio, 408.

We respectfully contend that it was legally impossible for Henry Anderson to have been a good faith purchaser without notice, and that as Butler had been in possession under a previous claim of title, neither he nor his grantee, Bronson, nor petitioner, was estopped to deny the Anderson title.

> "The rule of estoppel applies in cases only where the grantee receives and holds possession, by virtue of the conveyance from the grantor, and relies upon it as the source of his title; it does not apply, where the grantee already held, under a prior and independent conveyance.
>
> "A person in possession of real estate under a bona fide claim of title, has the right to buy in any title, real or pretended, with a view to quiet the enjoyment of his possession; and the purchase of the adversary title, if it does not strengthen, cannot impair his title."
>
> Coakley vs. Perry, 3 O. S., 344.

The circuit court of appeals in its second decision herein (Tr. 260) (158 Fed., 250), held that in 1843 Butler was the owner of the land in controversy by virtue of the Bissell deed, and as Butler was also in possession *prima facie*, under the settled law of Ohio, the statute of limitations took effect. Everywhere it is the law that when the statute once begins to run it continues, notwithstanding infancy or other changes in the estate.

> "Where time begins to run against the ancestor, it continues to run against the heir, although the latter is an infant. This is the universal rule in respect to the statute of limitations, and the general rule in equity, when lapse of time is relied on as a bar."

Williams vs. The First Presbyterian Church in Cincinnati, 1 O. S., 478.

Granger, Admr., vs. Granger, 6 Ohio, 42.

The Ohio statute of limitations, in effect December 7, 1840, provided as follows:

> "That all actions hereinafter mentioned, shall be commenced within the several times hereinafter limited, after the cause of such action shall have accrued, and not after;
>
> First: Actions of ejectment, or any other action for the recovery of the title, or possession of lands, tenements or hereditaments, within twenty-one years." * * * *

29 Ohio Laws, 214 (passed Feb. 8, 1831).

Swan's Statutes of Ohio, 1841.

This statute, in substantially the same form, has since been continually in effect.

51 Ohio Laws, 57 (passed March 11, 1853).

2 Swan & Critchfield's Statutes of Ohio, p. 944, (1860).

Sec. 4977, R. S. O., now Sec. 11219 General Code.

XIII.

ERROR IN REVERSING SECOND JUDGMENT.

Upon the second trial (Tr. 240) both parties asked a directed verdict and nothing more. "It therefore stood admitted that there was no question of fact in proof, sufficient to prevent a ruling being made, and the motions together amounted to a request that the court should find any facts necessary to make it." Upon the motion of petitioner, a verdict was returned in his favor, and judgment entered thereon accordingly. This action of the trial court conclusively determined the facts in favor of petitioner, and we respectfully submit that the circuit court of appeals, upon the second writ of error thereto, erred in reversing this judgment. (Assignment of Errors V Sec. 2, 3, 4.)

Beuttell vs. Magone, 157 U. S., 154.

Sena vs. Am. Turquois Co., 220 U. S., 497-501.

XIV.

THE FEDERAL COURTS DENIED FULL FAITH AND CREDIT TO STATE JUDGMENTS AND DECREES.

We respectfully submit that the circuit court and the circuit court of appeals each erred in denying full faith and credit to the several final judgments and decrees of the courts of Ohio, in favor of your petitioner, duly pleaded proved and relied upon by him herein. (Assignment of Errors IV Secs. 1, 2, 3, V Secs. 3 and 4).

See amended and supplemental answer. (Tr. 268-287).

Supplement to third defense thereof. (Tr. 293-298).

Record in Anderson vs The United Realty Co., Messinger et al., (Tr. 322-400).

Record in foreclosure suits. (Tr. 400 to 521).

Stipulation as to authenticity of records and documents (Tr., 549).

See this brief, p. 8.

The First Final Judgment Was in the State Court and Closed the Controversy.

Anderson vs. Messinger, ejectment, now under review, begun in the federal circuit court, December 27, 1904, was first tried at the June term, 1905, and resulted adversely to respondent.

July 25, 1905, represented by the same attorneys, respondent brought another action in ejectment in the state court against The United Realty Company, petitioner and others.

The prayer of the petition was:

For judgment against the defendants, including Messinger; for possession of the premises described in the petition; for $50,000.00 with interest; for rent, profits, or damages accruing subsequently to the bringing of the action; for costs and *all other legal and equitable relief*.

It is manifest that respondent brought the second action in the state court for the purpose of trying his chances in that jurisdiction, and hoping for better success than had attended him in the federal court.

In each action respondent based his claim to the property involved therein, solely upon the will of his grandfather, Henry Anderson. The actions presented the same issues, and the title asserted by respondent and your petitioner, respectively, in each to the property involved therein, was the same and based upon the same facts and required and resulted in a judicial determination by each of said courts of the same questions of fact and law.

Upon respondent's writ of error the case under review was first heard and submitted to the circuit court of appeals, February 14, 1906.

About a week later counsel for respondent voluntarily entered upon the trial of the case in the state court, which resulted adversely to him, a verdict in favor of the defendants, including the petitioner here, being returned and filed therein March 2, 1906. Final judgment entered therein March 31, 1906, (79 O. S., 23), has since been affirmed by this court.

Of course, neither court would for a moment have considered hastening proceedings in the case before it because of the pendency and submission to the other of the case therein between the same parties, involving the same questions. Respondent was the plaintiff in both cases, and was proceeding voluntarily in each, and without intending the slightest disrespect to his counsel, it occurs to us that

counsel and client stand upon doubtful and unsafe ground when urging any advantage by reason of having first submitted to the circuit court of appeals the question raised upon the first writ of error herein, since without waiting for the decision of this court, they forthwith hastened to the state court to there try and submit the same questions for its consideration and determination.

It thus appears that although the action in the federal court was begun first, final judgment was first rendered in the action in the state court.

Where suits are pending between the same parties, which involve the same issues, in two courts of concurrent jurisdiction, it is the first *final judgment*, although it may be rendered in the second suit, which renders the issues *res adjudicata* in the other court, and closes the controversy.

This rule is sustained by every consideration of justice and public policy, and any other would result in endless uncertainty and confusion.

> Insurance Co. vs. Harris, 97 U. S., 331-336.
> Schuler vs. Israel, 120 U. S., 506-509.
> Forsythe vs. Hammond, 166 U. S. 506.
> Bryar vs. Campbell, 177 U. S., 649-657.
> Mitchell vs First Natl. Bk., 180 U. S. 471, 479, 480.
> Sharon vs. Hill, 26 Fed., 337. (C. C. Cal. Deady, J.)

Discussing the effect of the judgemnt in *Anderson vs. The United Realty Co., Messinger et al.*, the circuit court of appeals in its last opinion herein (Tr. 615) (171 Fed., 788-789) say:

> "In the case before us it appears that after the judgment below the supreme court of Ohio affirmed the judgment whose finality is questioned, and that this fact was brought to the attention of the court below upon an application for a new trial. Under

such circumstances we shall, for the purpose of this case, assume that this judgment was competent evidence in support of the plea of *res adjudicata*.

The title of the plaintiff in both actions depended absolutely upon the will of his ancestor, Henry Anderson. Interpreted as he contended, his title was clear and indisputable; construed as the defendant in both actions insisted, he took nothing under that will, and his actions must inevitably fail.

That a final interpretation of that will in one suit would control in any subsequent litigation between the same parties or privies, in which the same question, under the same conditions, should arise, if presented seasonably, as a former adjudication, is not disputable. That different parcels of land were involved in the two cases would not be material; for if the parties were the same, and the subsequent case should turn upon the same question decided in the former case, under like conditions, that question could not be relitigated if relied upon as an estoppel. *Bank vs. Beverly*, 1 Howard, 134, 149; *New Orleans vs. Citizens' Bank*, 167 U. S., 371, 396; *S. P. Rd. Co. vs. United States*, 168 U. S. 1, 48; *Union Bank vs City of Memphis*, 111 Fed., 561.

Thus in *New Orleans vs. Citizens' Bank*, *supra*, Mr. Justice White, for the court, said:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

"The rule of estoppel relied upon is, therefore, well settled."

The court, however, held that it was bound by its first decision and judgment herein, and that the law of the case thereby established was final and conclusive. We respectfully submit that this was error. We consider this question again at page 152 of this brief. Before discus-

sing it further we wish to consider what, we respectfully submit, was error on the part of the circuit court of appeals in its decision as to the findings and decrees of the state court in the foreclosure suits.

We respectfully submit that the final decrees of the state courts in the suits in equity brought by the United States Mortgage & Trust Company to foreclose its mortgages on the Toledo property were and are *res adjudicata.*

These suits involved the same title and required a determination of the same and additional questions of fact and law as were involved in the case under review.

Upon the authority of *Wilcox vs. Consolidated Co.*, 212 U. S., 19-40, it is established that a plaintiff cannot be forbidden to try the facts upon which his right to relief is based, before a court of his own choice, if otherwise competent; and it is, therefore, clear that the United States Mortgage & Trust Company had the undoubted right to determine for itself in what jurisdiction it should begin proceedings in foreclosure.

Dickermon vs. Northern Trust Co., 176 U. S., 181, 190.
Blair vs. Chicago, 201 U. S., 400, 448.

Petitioner and respondent were parties thereto, each appeared therein (Tr., 412-458), and asserted and litigated their respective claims to the mortgaged premises, which included all the property involved herein.

Clearly it was the right of petitioner and the duty of his counsel to defend any claims made in these suits with respect to the mortgaged property, and as the party in possession of the premises in controversy, your petitioner was certainly at liberty, under the provisions of the Ohio statutes, to bring an action therein, as he did, upon cross petition against respondent, to quiet title, and to cause pro-

cess to issue thereon. Sec. 5779, R. S. O. (Sec. 5067-5069, R. S. O. *Southward vs. Jamison*, 66 O. S., 290.

These suits were removed to the federal court on respondent's petition, and after full hearing were remanded to the state courts, an order fully sustained by *Bradley vs. Parkhurst*, 20 Kan., 462-465-467, opinion of Mr. Justice Brewer.

Shortly after the remanding of these suits, counsel for respondent voluntarily appeared in each of them (Tr., 412, 458) and after the issues were duly joined between all the parties thereto both upon the petitions and cross petitions therein, they were duly consolidated by consent of all parties and were heard by and submitted to the court of common pleas upon said issues and upon the evidence duly produced and offered before the court; and on such hearing and submission, final decree was entered therein June 5, 1907. (Tr., 493, 494.)

Not only were the foreclosure suits duly remanded by the federal court to the state court, but the latter, in proceeding therewith, and in rendering its final decree therein was not in conflict with the federal courts herein.

The federal circuit court, at its December term, 1907, had again rendered judgment in favor of petitioner, and when the common pleas court rendered its final decree, June 5, 1907, it followed as it was bound to do, the prior decision and judgment of the Lucas county circuit court, in *Anderson vs. The United Realty Company, Messinger, et al.*, and in so doing was also in accord with the judgment in favor of petitioner, then existing in the federal circuit court.

The final decree in the foreclosure suits rendered on appeal by the state circuit court, in favor of petitioner, as to part of the property, was rendered April 4, 1908, and we respectfully submit that at this time and prior to June

2, 1908, when the federal circuit court entered its last judgment in *Anderson vs. Messinger*, it was merely a pending suit, which did not and could not bar the suits in the state court.

Stanton vs. Embrey, 93 U. S., 548-554.
Colt vs. Colt, 111 U. S., 566-578.
C & O. Ry. Co. vs. McCabe, 213 U. S., 207.

The construction given Anderson's will by the circuit court of appeals, was not necessarily involved in either of the decrees rendered by the state courts, and certainly the decision of the federal court did not impair or defeat the right of the state courts to render final decrees in the suits before them, and we respectfully submit that the federal courts were not warranted in disregarding and refusing to give effect to either of these decrees.

The common pleas court, by its decree in the consolidated foreclosure suits, found that Henry Anderson held the mortgaged premises, which included all the property involved herein, as security for the payment of a debt owed to him by Charles Butler, and for no other purpose; that this indebtedness had been paid in full and had been released and discharged by Anderson's executors; that Messinger was entitled to have a release, discharge and conveyance from Peter Anderson, respondent, of any and all claims, interest, lien or title which he had or claimed to have against said premises, the claim asserted thereto by respondent in *Anderson vs. Messinger*, under the deed from Edson Allen, master commissioner, being specifically described, and duly and fully quieted the title of petitioner thereto against all claims and demands on the part of respondent and in default of conveyance, thereby ordered to be made by him within three days, the decree operated as such conveyance. Respondent was also permanently enjoined from asserting any claim to said premises.

Section 5318 of the Revised Statutes of Ohio, now Section 11590 General Code, continuously in effect since February 19, 1810, gave this decree the same operation and effect, and rendered it as available for petitioner's protection as if a conveyance had, on June 5, 1907, been duly executed and delivered by respondent to petitioner.

This section is as follows:

> "When the party against whom a judgment for a conveyance, release, or acquittance is rendered, does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance, release or acquittance had been executed conformably thereto."
>
> Section 5318 Revised Statutes of Ohio, now Section 11590 General Code.

This statute was construed and approved by this Honorable Court in *Steele's Lessee vs. Spencer*, 1 Peters, 552-557 (1827), and by the supreme court of Ohio in *Taylor vs. Boyd*, 3 Ohio, 337, which held that a decree for conveyance without the execution of a deed in compliance therewith, transfers the title as if the deed had been executed. That this has become a rule of property in Ohio cannot be doubted.

Clearly the state courts in the foreclosure suits had complete jurisdiction of the parties and subject-matter, not only upon the several petitions of the United States Mortgage & Trust Company, but as well upon the several cross petitions of petitioner.

Section 5779 of the Revised Statutes of Ohio, now Section 11901 General Code, continuously in effect long prior to and ever since January 1, 1904, is as follows:

> "An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest; or such action may be brought by a person out of possession, having, or

> claiming to have, an estate or interest in remainder or reversion in real property, against any person who claims to have an estate or interest therein, adverse to him, for the purpose of determining the interests of the parties therein."
>
> Section 5779 Revised Statutes of Ohio, now Section 11901 General Code.

Section 5069 of the Revised Statutes of Ohio, now Section 11317 General Code, also continuously in effect long prior to and ever since January 1, 1904, provides as follows:

> "A counter-claim is a cause of action existing in favor of a defendant against a plaintiff or another defendant, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."
>
> Section 5069 Revised Statutes of Ohio, now Section 11317 General Code.

Under the Ohio practice when a cross petition sets up matters not drawn in question in the petition, and seeks affirmative relief against a co-defendant, of a nature different from that sought in the petition, summons on the cross petition is necessary.

> Southward vs. Jamison, 66 O. S., 290.

On petitioner's cross-petition in each of the foreclosure suits, summons was issued (Tr., 407, 412), (Tr., 453, 458), on all the defendants therein including respondent. This became unimportant, however, as respondent voluntarily appeared and defended these suits.

> "A court will acquire jurisdiction of the person in a suit originally commenced by an attachment *in rem*, if the party against whom the claim is set up voluntarily appears and submits himself to the jurisdiction, demurs, pleas, and goes to trial on issues made."
>
> Maxwell vs. Stewart, 22 Wall., 77, 80.

Had he not done so all question with respect to petitioner's right to have adjudicated his differences with respondent upon his cross-petition in the foreclosure suits, was, under the Ohio practice, settled by respondent's voluntary appeal from the common pleas to the state circuit court. Respondent was not required to appeal. He might have reviewed the decree of the common pleas court by proceedings in error. The process is a simple one, and the remedy afforded thereby ample. By appealing respondent voluntarily took the consolidated cases to the state circuit court and asked that court to try them and adjudicate the rights of the parties not upon questions of law alone, but upon all the issues in the case.

Mason vs. Alexander, 44 O. S., 318-320.

In Ohio a petition in error is a new action to reverse the judgment below, but an appeal is, in the circuit court, the same action as in the court of common pleas; and a voluntary appearance in the circuit court, is in legal effect, the same as such appearance in the common pleas court.

Foster vs. Borne, 63 O. S., 169-172.

Jenney, Admr., vs. Walker, 80 O. S., 100.

It appearing that the state courts had complete jurisdiction of the parties and subject-matter, the federal courts could not set aside their final judgments or decrees.

Nogue vs. Clapp, 101 U. S., 551.

Colt vs. Colt, 111 U. S., 566-578.

Graham vs. Boston Co., 118 U. S., 161-177.

Little Rock vs. Burke, 66 Fed., 83, 88-9 (C. C. A., 8th Cir.).

Ill. Cent. Ry. vs. Sheegog, 217 U. S., 599.

The requirement of the constitution is not that *some*, but that *full faith and credit shall be given* to judicial judgments and decrees:

U. S. Constitution, Art. IV, Sec. 1.
Sec. 905, U. S. Rev. Stat.
Haddock vs. Haddock, 201 U. S., 562-567.
Insurance Co. vs. Harris, 97 U. S., 331, 335.
Keyser vs. Lowell, 117 Fed., 401, 406 (C. C. A., 8th Cir.).
Kansas City vs. Morgan, 76 Fed., 429 (C. C. A., 6th Cir.).

We respectfully submit that the lower courts in disregarding and refusing to give effect to the final judgments and decress of the state courts in favor of petitioner, invaded, impaired and defeated his rights under the federal constitution

The circuit court of appeals in some way overlooked the undisputed record evidence, establishing that the consolidated actions in foreclosure were heard by the circuit court of Lucas county, Ohio, March 9, 1908 (Tr., 515), and that a final decree as to part of the property was entered therein March 13, 1908 (Tr., 518), several months before the last trial in the federal circuit court of the case under review.

The court was clearly mistaken in stating in its last opinion (Tr., 613) (171 Fed., 786) that respondent's appeals in these suits were pending in the supreme court of Ohio when *Anderson vs. Messinger* was last heard in the circuit court. (June 2, 1908.) In our petition for rehearing in the circuit court of appeals, we respectfully directed the attention of the court to this inadvertence. (Tr., 626-629.)

Under the Ohio practice judgments or decrees rendered by the circuit court are not appealable to the supreme court, and are only reviewable thereby upon petition in error.

This statute provides as follows:

> "A judgment rendered, or a final order made by a circuit court, or a judge thereof, court of common pleas, or judge thereof, * * * may be reversed, vacated or modified by the supreme court, on petition in error, for errors appearing on the record; but no petition in error except as to the judgment or final order of the circuit court, or a judge thereof, * * * shall be filed without leave of the supreme court, or a judge thereof, and the supreme court shall not in any civil cause or proceeding, except when its jurisdiction is original, be required to determine as to the weight of the evidence; and on application of any party excepting to a ruling or decision of the circuit court during the trial, or on motion for a new trial, such court shall find from the evidence, and state on the record the facts upon which the alleged error arises, or which may be material in determining whether error has intervened or not."
>
> Section 6710 Revised Statutes of Ohio, now Sections 12250 to 12253, inclusive, General Code.

No other explanation is suggested by the circuit court of appeals in its last decision herein for denying the effect of the last decree of the state circuit court, and we respectfully submit that since the statute of Ohio provides for no appeal in equity suits or in other cases from the circuit to the supreme court, the circuit court of appeals, beyond question, erred in its conclusion "that the judgments and decrees in the foreclosure cases were lacking in the finality essential to support a plea of *res adjudicata* herein."

In connection with this conclusion the court said (Tr., 613) (171 Fed., 786-7): "We need not stop to look

into this matter because for the purpose of this case it is enough to determine the legal effect of the judgment in *Anderson vs. The United Realty Co., Messinger, et al.*, as a bar to this suit. If that was effectual we must reverse the judgment; if it was not, the foreclosure decrees would not be for the same reason, without going further." With this observation the court dismissed all further consideration of the findings and decrees in the foreclosure suits.

We respectfully submit that the circuit court of appeals was also mistaken concerning the effect of the appeal by respondent from the final decree of the common pleas court to the state circuit court. In Ohio this appeal "did not uproot the decree," although it carried the case to the state circuit court for rehearing upon the law and facts. (Tr., 614.) (171 Fed., 788.) Its effect, however, was only to suspend the enforcement of the decree during the pendency of the appeal, but did not impair its validity or effect.

The statutes of Ohio relating to appeals provide:

> "When an appeal is taken, and bond given, the judgment is thereby suspended, unless some part of the final judgment appealed from be an injunction, in which case such injunction shall not be suspended, except by order of the circuit court, or two judges thereof, on reasonable notice to the adverse party; * * *."
>
> Sec. 5235, R. S. O., now Secs. 12234 and 12235 General Code.

> "When the party against whom a judgment is rendered appeals his cause to the circuit court, the lien of the opposite party on the real estate of the appellant, created by the judgment, shall not be removed or vacated by the appeal; ~~but the lien on the real estate of the appellant, created by the judgment, shall not be removed or vacated by the appeal,~~ but the real estate of the appellant shall be bound, in the same

manner as if the appeal had ont been taken, until the final determination of the cause in the circuit court."

Sec. 5236, R. S. O., now Sec. 12237 General Code.

In the late case of *Jenney, Admr., vs. Walker*, 80 O. S., 100, above cited, decided March 9, 1909, it was declared that the effect of an appeal is not to vacate and destroy the judgment appealed from, its only effect being to suspend such judgment, and to stay proceedings to enforce its execution. It does not operate to annul the judgment; or to otherwise impair its vitality and obligation than by merely suspending its enforcement during the pendency of the appeal. The lien, if any, created by the judgment is not removed or vacated by the appeal, but subsists and continues in the same manner and to the same extent as if the appeal had not been taken.

It may be claimed by counsel for respondent that the decrees of the state courts did not conclude him, because he was denied trial by jury.

In *Maxwell vs. Stewart*, 21 Wallace, 71, it was claimed that a judgment of a Kansas court was void, because of trial by the court, without the waiver of a jury entered upon the journal, as provided by the Kansas statute. At page 73, the court say:

"Whatever might be the effect of this omission in a proceeding to obtain a reversal or vacation of the judgment, it is very certain that it does not render the judgment void. At most it is only error and cannot be taken advantage of collaterally."

In respondent's answers in the state suits, he did not ask affirmative relief, but, independently of this, he was not, under the Ohio practice, entitled on the issues tendered to a trial by jury. Had respondent desired to test the

decision of the common pleas court, with respect to such right, his remedy would have been by proceedings in error to the circuit court; but if the right existed, it was waived by respondent's appeal to said court. The appeal having been there sustained and entertained, errors occurring in the court below, if any, were thereby waived, or became immaterial.

Hull vs. Bell, 54 O. S., 228.

Section 5226 of the Revised Statutes of Ohio, now section 12224, General Code, makes it clear that if respondent had a right to trial by jury in the common pleas court, he had no right of appeal therefrom. The statute is, as follows:

> "* * * An appeal may be taken to the circuit court by a party * * * directly affected from a judgment or final order in a civil action rendered by the common pleas court, and of which it had original jurisdiction, *if the right to demand a jury therein did not exist.*" * * *

It is well settled that the pending of proceedings in error to reverse the decree of the common pleas court, had any such proceedings been prosecuted, would not in any respect have destroyed the probative value of the decree of either the common pleas court or the circuit court.

Railway Company vs. Trombley, 100 U. S., 78.

In *Deposit Bank vs. Frankfort*, 191 U. S., 499, 510-11, it is said:

> "We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons, or has been subsequently reversed, that it is any the less effective as an estoppel between the parties while in force."

We respectfully submit that under the decree of the common pleas court of June 5, 1907, petitioner's title was quieted to the premises in controversy until and unless said decree was set aside by decree or judgment of reversal by the state court in the same suit, and that the title evidenced by said decree was disregarded by the federal circuit court and the circuit court of appeals, in violation of petitioner's constitutional rights.

We further respectfully submit upon the authority of *Mason vs. Alexander*, 44 O. S., 318-330, and *Foster vs. Borne*, 63 O. S., 169-172, above cited, that respondent by appealing from this decree to the state circuit court adopted these consolidated actions as his own, and is, of course, bound by everything thereafter done therein.

This principle is recognized and announced by this Honorable Court in *Ry. Co. vs. Eastin*, 214 U. S., 153.

The disturbing and harmful result of the disregard by the federal courts of the state judgments and decrees is apparent. Upon the same title involving the same questions of fact and law, the state court in *Anderson vs. The United Realty Co., Messinger, et al.*, has decided that part of the square in controversy justly belongs to petitioner and his co-defendants, and by the decrees of the state court the title of petitioner to the premises in the case at bar has been adjudicated in his favor and quieted against all claims and demands asserted thereto by respondent.

Notwithstanding these adjudications, the federal courts have sustained the claims of respondent to the premises involved in *Anderson vs. Messinger*.

The Law of the Case Did Not Impair Defense of Res Adjudicata.

The law of the case did not require or sustain the action of the circuit court or of the circuit court of appeals in disregarding and refusing to give effect to the state judgments and decrees.

As stated, the first final judgment construing the will of Henry Anderson was rendered by the state court in an action at law March 31, 1906 (Tr., 334) (affirmed 79 O. S., 23). The decree in the consolidated foreclosure suits was rendered by the common pleas court June 5, 1907 (Tr., 493), and related to all of the property in controversy in the action in the federal court and also to two adjacent parcels. The decree of the circuit court, on respondent's appeal thereto, was rendered as to part of said property March 13, 1908. (Tr., 518.) This judgment and these decrees were in full force and effect and were duly pleaded and proved when *Anderson vs. Messinger* was last tried at the June term, 1908, in the federal circuit court.

In discussing this question, the circuit court of appeals, in the course of its opinion, after stating that it has upon a second writ of error no power to modify or re-examine its former judgment as to the will of Henry Anderson which it holds (Tr., 623) (171 Fed., 796) is not a question of *stare decisis*, but one of *res adjudicata*, further says:

> "That the question arose in the court below under a plea of *res adjudicata*, does not alter the principle involved. To give effect to that defense required that court to disregard the mandate and adjudication of this court. If this court is to regard that defense, it will require us to reverse our own former decision. The way the matter came up is peculiar, but the rule which applies is not thereby abrogated."

We respectfully submit that this announcement of the law is contrary to the rule established by the late decision of this Honorable Court in *Chesapeake & Ohio Ry. Co. vs. McCabe, Admx.*, 213 U. S., 207, 214.

In this case the judgment of the court of appeals of Kentucky was reversed because that court upon a third appeal, believing itself bound by its former decisions in the same case as the law of the case, refused to give effect to a judgment of the circuit court of the United States between the same parties, with respect to the same subject-matter, entered after the second hearing in the state court of appeals and duly pleaded and, for the purpose of review, proved upon the last trial in the state circuit court.

If the law of the case as announced by the court of appeals of Kentucky did not warrant the state court upon re-trial in denying effect to a federal judgment duly pleaded and proved, it is difficult to perceive upon what principle the circuit court of appeals was warranted in reaching an exactly opposite conclusion herein as to the effect of the state judgment and decrees duly pleaded and proved in the case under review.

We respectfully submit that it is well settled law that when a cause is reversed and remanded by an appellate court generally, the judgment of the appellate court is not a final judgment and is never *res adjudicata* with respect to new issues and facts.

Aurora City vs. West, 74 U. S., 82-96.
Smith vs. Adams, 130 U. S., 167.
Eckert vs. Binkley, 134 Ind., 614-622.
Friedman vs. Lesher, 198 Ill., 21.
Blakeslee's Co. vs. Ford, 215 Ill., 230-233.
Trust Co. vs. Railway Co., 217 Ill., 504-506-507

We further respectfully submit that the last decision of the circuit court of appeals herein, is directly contrary to and disregards the rule announced by this Honorable Court in *Aurora City vs. West, supra*, as follows:

> "A reversal in a court of last resort, remanding a case, cannot be set up as a bar to a judgment in an inferior court in the same case."

In the course of its opinion, at page 93, further says:

> "Unless a final judgment or decree is rendered in a suit, the proceedings in the same are never regarded as a bar to a subsequent action."

In this connection, we submit that the decision by the circuit court of appeals in *Anderson vs. Messinger*, an action at law, in no respect limited or impaired the jurisdiction of the courts of Ohio in the equitable suits brought therein.

Foster vs. Mora, 98 U. S., 425.
N. P. R. R. vs. Paine, 119 U. S., 561.
Dwyer vs. Garlough, 31 O. S., 158-160.

But if the circuit court of appeals was limited, upon the second and third proceedings in error herein, to the consideration of errors committed after its first mandate, no such limitation applies to the Honorable the Supreme Court of the United States in the exercise of its supervisory powers, upon writ of *certiorari*.

Panama Co. vs. Napier Co., 166 U. S., 280-284.

XV.

CUSTODY OF PROPERTY IN STATE COURT.

We respectfully submit that in any view of the case, since May 6, 1907, when judgment was entered in the foreclosure suits in the state court, and execution was issued and levied thereunder upon the premises in controversy, and duly returned, the custody of the entire property involved in the case at bar has been solely in the state court, and must be administered thereby (Tr. 520-521).

Freeman vs. Howe, 24 How., 450.

Pulliam vs. Osborne, Admr., 17 How., 471.

Heidritter vs. Elizabeth Oil-Cloth Co., 112 U. S., 294, 305.

And a constructive levy is sufficient.

Southern Bank vs. Folsom, 75 Fed., 929 (C. C. A., 6th Cir.).

XVI.

THE CIRCUIT COURT AND THE CIRCUIT COURT OF APPEALS EACH DISREGARDED THE STATUTES AND DECISIONS OF OHIO RELATIVE TO TAX TITLES.

Upon the last trial in the circuit court herein the eight certified copies of tax deed (Tr. 534-549) offered in evidence by petitioner were excluded, to which exception was duly entered. In this we respectfully submit the trial court erred, and that the circuit court of appeals erred in affirming the action of the lower court. (Assignments of Error II, IV, V.)

The act under which these deeds were executed, provided that they "shall vest in the grantee, his heirs and assigns, a good and full title, both in law and equity, and shall be received in all courts as evidence of a good and full title to said grantee, his heirs and assigns, and of the legality of all antecedent proceedings until impeached by some person or persons having an interest therein, in setting aside the same."

Sec. 7, Act of 1846, 44 Ohio Laws, 210.
Sec. 4143 Revised Statutes of Ohio, now Sec 8557 et seq., General Code.

We submit that the words "until impeached" as used in this act mean until set aside or overcome by evidence showing illegality of the antecedent conditions.

The word "impeached" may mean "*to charge*" or to "set aside" according as it is used in a given case. When used in regard to judgments or proceedings, it means to set them aside, and is so used in all the authorities and books in regard to impeaching of judgments, or other proceedings.

Under a statute of Maine for assessing by commissioners of the damages from the overflow of land, it was provided that the report of the commissioner should govern, unless

"impeached" by evidence. Under this statute the supreme court of Maine construed the word "impeached" to mean overcome by sufficient evidence showing its illegality.

The court say:

> "Upon the coming in of the commissioners' report, the case is to be tried by a jury in court, at the request of either party. Upon this trial, the report is to be 'given in evidence, subject to be impeached by evidence from either party.'
>
> "Until such report of the commissioners has been impeached by testimony it is decisive of the parties' rights."
>
> Bryant vs. Glidden, 36 Maine, 36.

The above case seems to be a leading one on the subject, and is referred to by all the authorities and text books as to the legal meaning of the word "impeached."

The section above quoted implies the meaning intended by the word "impeached." The phrase "until impeached by some person or persons having an interest therein in setting aside the same," implies that the impeachment therein intended must be such as to set aside the tax title, for after it is impeached it is no longer evidence of any title in the grantee or of anything else. The effect of the tax deed is thereby wholly overcome or destroyed. The deed is thereby set aside and held for naught, but until such impeachment takes place, it is *prima facie* evidence of title.

Such meaning was given to the word "impeached" in a tax case decided by the Ohio supreme court only a few weeks before the statute in question was passed. Speaking in reference to the effect of a tax deed executed under the Act of March 14, 1831, which made the deed *prima facie* evidence of title, without preliminary proof and threw the burden upon the person attacking the deed, the supreme court say:

> "It makes the deed, while unimpeached, evidence—evidence, in and of itself, without any other proof."
>
> Turney vs. Yeoman, 14 Ohio, 218.

We, therefore, respectfully submit that the legislature in using the word "impeached" intended to adopt the meaning given to it in the case of *Turney vs. Yeoman.*

We also invite special attention to the case of *Lamb vs. Gillette*, decided by Judge Leavitt, United States circuit judge, as a learned and able discussion of the several tax laws of Ohio, on this and other points involved in this case.

Lamb vs. Gillette, 6 McLean, 365.

We further respectfully submit that the execution and delivery of these deeds by the clerk of the city of Toledo, a public officer, is within the rule that acts done which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter.

It is settled law that facts presumed are as effectually established as facts proved, where no presumption is allowed.

Cornett vs. Williams, 87 U. S., 226, 250.

Ward's Lessee vs. Barrows, 2 Ohio St., 247, is quoted and approved in *Cornett vs. Williams, supra*, as follows:

> "Therein a sale for taxes came under examination. It was held that certain acts of the county auditor were presumptive proofs that he had administered to the collector the oath prescribed by law touching the delinquent list. The sale was sustained. Here the judge who made the order of sale was the judge to approve the claim. The order was presumptive proof of the requisite approval. Such approval was necessarily implied, and what is implied in a record, pleading, will, deed, or contract, is as effectual as what is expressed."

Legislation Respecting Tax Titles Was Constitutional.

Upon the second trial herein petitioner not only offered in evidence certified copies of the eight tax deeds, but also made due proof of compliance, by the city of Toledo, with all "antecedent proceedings authorizing the execution and delivery of

these deeds." Thereby petitioner may unnecessarily have assumed the burden of proving these matters, but that he made full and complete proof thereof is, we respectfully submit, established by the record of the second trial. (Tr. 154-204.) However, as the judgment upon this trial was rendered by the court in favor of petitioner, after respondent and petitioner had each moved for a verdict by direction, and without other request by either party, (Tr., 114) (this brief, 135), the court thereby conclusively determined that everything required to authorize and validate these deeds, had been done.

The circuit court of appeals, (Tr. 254) (158 Fed., 250) held unconstitutional the legislation under which the city of Toledo made the improvement, and levied and collected the assessment upon payment of which these deeds were issued. In substance, the court held that the act of 1837 contravened the principle expressed in the 14th amendment of the federal constitution, because thereby property owners were deprived of their property without due process of law. Therein, we respectfully submit, the court erred.

It seems to us that the court reached this conclusion because it regarded and treated the assessment in question as local and not general in its character.

No one at all familiar with Toledo, can read the proceedings authorizing this assessment, (Tr. 154-204) and fail to be impressed with the fact that the improvement thereby authorized, actually laid, established and provided for the protection of the very foundations of the city. The improvement was of the most general character; involved and required an expenditure of over $40,000; it benefitted and specifically included substantially the whole city, and was of the greatest importance to every citizen. Since it affected a district which comprised and included large numbers of persons owning land benefited by the improvement, we respectfully submit that, within the principle announced by the circuit court

of appeals in its decision herein (Tr. 257) (158 Fed., 255), the city of Toledo had the power to specialize such district, for the purpose of levying and collecting an assessment for the making of such an important improvement, quasi public in its purpose, analogous to the power of the municipality to levy general taxes. It was of course necessary as the court say, that the city should comply with the provisions of the statute authorizing the making and levying of such assessment, but as stated above petitioner proved, and the trial court found that all antecedent proceedings were regular.

We are unable to agree with the conclusion of the circuit court of appeals that the statute did not provide for notice, which gave every property owner an opportunity to be heard before the improvement was made, and the assessment levied.

Section 28 of the act of 1837 provided:

> "* * * The city council shall appoint a committee of three disinterested judicious freeholders of said city, to estimate the cost of any such projected improvement and to assess the expense on the land and grounds as aforesaid; the city council shall give notice in one of the newspapers published in said city or vicinity, for six consecutive weeks, of the improvement to be made, in order that any one damaged by reason of such improvement may file his claim in writing in the office of the city clerk within ten days after the expiration of said six weeks' notice; and the said committee shall assess the damages, if any, of such claimants, and shall add the same to the cost of the improvement as a part of the expense thereof to be assessed as aforesaid; and said committee within twenty days shall have expired for filing claims for damages, shall return to the office of the treasurer, setting forth the estimated cost of such projected improvement, including the damages awarded by them set opposite their respective names, and also a brief description of the lands and grounds upon which they shall have assessed the expense of the improvement, with the names of the owners or persons liable to pay the assessment respectively annexed, and the amount thereon assessed set opposite to their respective names."

We respectfully claim and submit that a fair construction of this statute is, that all parties interested had full opportunity to be heard before the assessment was made.

This legislation was enacted, and the assessment thereunder made, long before the adoption of the 14th amendment to the federal constitution in 1868.

It is, of course, true as the circuit court of appeals say, that this amendment, requiring due process of law, formulated a principle of justice which had long been recognized; nevertheless, prior to the adoption of the amendment, it had not become a part of the law of the land justiciable by the federal courts, if the principle therein expressed was in conflict with settled rules with respect to real property, established by the course of decision of the state courts.

But it will probably be claimed by counsel for respondent that the act of 1837 contravened the provisions of section 4, article VIII, of the constitution of Ohio, adopted in 1802, viz:

> "Private property ought and shall ever be held inviolate, but always subservient to the public welfare."

In 1850 the supreme court of Ohio passed upon this exact question in *Bonsall vs. Mayor of Lebanon*, 19 Ohio, 418.

A special sidewalk tax had been levied against a town lot in Lebanon, and the owner brought a suit in equity to enjoin the collection of the tax, claiming that the legislation authorizing the assessment was unconstitutional.

At page 422, the court, in the course of its opinion, say:

> "It is still more preposterous to claim that the proceeding is a violation of Art. 8, Sec. 4 of the constitution. There is here no appropriation of the property of the citizen to the use of the public. If so, it should surely be paid for. The public, however, have expended money to improve the property of the citizen, and it is equally right that the property itself should be held for its reimbursement. The demurrer is sustained and the bill dismissed with costs."

In *Scoville vs. Cleveland*, 1 O. S., 126, decided in 1853, the court passed upon the charter of the city of Cleveland, which was in all essential respects so far as the question under consideration is concerned, substantially identical with the charter of the city of Toledo, and the court held that it was a valid enactment under the constitution of 1802.

The action was one to enjoin the collection of a special tax assessed for the improvement of Superior street, in Cleveland. Judge Ranney delivered the opinion. At page 130 the court say:

> "Were the proceedings of the council in conformity to the charter and amendments? To a clear understanding of the matters arising under this question, it is necessary to recur to Sec. 9 of the city charter, passed March, 1836."

(The Toledo charter was passed January 7, 1837.)

After disposing of certain technical objections as to the passage of the ordinance, etc., the court at page 132 say:

> "It is next objected that no sufficient notice 'of the improvement to be made' was given to claimants of damages, in pursuance of said Sec. 9. The notice actually given was the publication of the ordinance, with the word 'notice' prefixed. It is nowhere alleged or pretended that the complainant had any claims for damages, or that he was in any way injured for the want of a proper notice. It is difficult to see how *he* can make this objection enure to his benefit, or how it can add anything to the *equity* of his bill. It will be in time to decide this question when those who have been injured complain."

And after discussing other questions which are of no importance here, the court at page 134 say:

> "The next question arising is, was the charter itself consistent with the first constitution of this state, under which these proceedings were had? To show that it was not, two sections of that instrument are invoked.
>
> "They are as follows:

"Article 8, Section 4. Private property ought, and shall ever be held inviolate, but always subservient to the public welfare; provided a compensation in money be made to the owner.'

"Article 8, Section 28. To guard against the transgression of the high powers which we have delegated, we declare that all powers not hereby delegated remain with the people.'

"Each of these sections contains very important provisions which it is the right of every citizen to invoke, and the duty of the judicial tribunals to guard with scrupulous fidelity."

The court then declares the Cleveland charter constitutional and the assessment valid.

In *Hill vs. Higdon*, 5 O. S., 243, opinion per Ranney, C. J., the question involved in the above cases was again under consideration.

The court in its opinion, at page 244, say:

"Can laws, authorizing the corporate authorities of cities and villages to levy a special assessment upon property particularly benefited, for the purpose of improving streets, continue in force, or be now passed, consistently with the present constitution of the state?"

and again at page 245 the court say:

"Laws of the character of those now drawn in question are no novelty in this state. Their origin is nearly coeval with our legislative history, and they have continued to multiply, as occasion has required, from that time to the present. Indeed, so true has this been, that there is no hazard in affirming, that the authority they give has been almost uniformly one of the important powers conferred upon municipal corporations. Nor has their consistency with our first constitution remained unchallenged. In at least two well considered cases, every objection that could be suggested has been answered, and their constitutionality fully affirmed. *Bonsall vs. Lebanon*, 19 Ohio, 418; *Scovill vs. Cleveland*, 1 Ohio St. (126) 127."

These decisions were regarded and followed by Judge Tayler on the second trial herein in the circuit court, and we respectfully submit should have been given like effect by the appellate court.

The circuit court of appeals in its decision herein, (Tr. 258) (158 Fed., 256), cite *Scott vs. Toledo*, 36 Fed., 385, (1888), and *Murdock vs. Cincinnati*, 39 Fed., 891, (1889), each decided by the late Mr. Justice Jackson, when circuit judge.

Each of these cases involved the construction of Ohio statutes providing for making special assessments for street and other improvements, known as sections *2262, 2263 et seq.* of the Revised Statutes of Ohio, of 1880, and amendments thereto. These sections, as found in the Revised Statutes of 1880, were enacted in 1874, (70 Ohio Laws, 127), and amended acts passed May 7, 1869.

Since the statutes construed in these cases were passed after the adoption of the 14th amendment, we respectfully submit that neither sustains the decision herein.

In *Scott vs. Toledo, supra*, Mr. Justice Jackson after holding that the proceedings in that case were in violation of certain articles of the Ohio constitution of 1851, *which were not in the constitution of 1802*, proceeds, beginning on page 391, with the discussion as to whether the proceedings were in violation of the 14th amendment of the federal constitution, and holds that such proceedings were in conflict therewith.

At page 395 of the opinion, it is said:

> "The fifth amendment, operating only as a limitation upon the powers of the general government, fell short of giving to the citizen the full protection to which he was entitled in respect to his life, liberty and property, so far as state action was concerned. It imposed no prohibition or limitation upon the power and authority of the states in dealing with the life, liberty and property of the citizen. They were left to the

> restraints of their several constitutions and respective laws on these subjects. So far as the states were concerned, citizens of the United States were thus left without adequate protection and security in their persons and property. The fourteenth amendment was adopted to remedy and correct this defect in the supreme organic law of the land."

Upon the foregoing authorities, we respectfully submit that the Toledo charter of 1837, was not in conflict with the Ohio constitution of 1802, or of the United States constiution as it existed at the time of this tax sale in 1847, and that the act of 1837 did provide for all the notice that was required in order to enable the city to levy a valid assessment.

The circuit court of appeals, in the course of its opinion, (Tr., 259) (158 Fed., 250), further say:

> "But the proceedings relative to the assessment had taken place as early as 1843, and it was put upon the roll of that year. For some reason the taxes and assessments on that roll were not collected."

From the best evidence obtainable half a century after the occurrences under review, petitioner showed, upon the second trial herein, that at least two litigated cases, the decision of which turned upon the constitutionality of the act of 1837 were carried to the court of last resort, (Tr. 197-203), and there determined adversely to those who had attacked the assessment. It further appears that in one of these suits a preliminary injunction was issued against the collection of this tax, and it is reasonably certain that this was decided by the supreme court of Ohio in favor of the city of Toledo.

We know, further, from undoubted evidence, that later Charles Butler, under whom petitioner claims title to the property in controversy herein, prosecuted to the supreme court of Ohio a case involving this very assessment, in which the question was whether or not the council of the city of Toledo, having found the amount realized upon the initial

assessment insufficient to pay for the improvement designed, could make an additional assessment in the same way on the same property, and the supreme court of Ohio held that it could.

Charles Butler vs. Toledo, 5 Ohio State, 225 (1855).

In this case the constitutionality of the amendment to the act of 1837 was expressly involved and sustained, and it would be strange indeed if the superstructure should have been held to exist without a foundation upon which to stand.

The litigations above mentioned and the amendment of the statute, fully explain why the taxes and assessments were not promptly collected.

We respectfully submit that the amendment of Toledo's charter in 1846 gave the city the right to enforce collection of assessments theretofore made.

It is quite manifest from the saving clause contained in the repealing act of 1846, that it was the intention of the legislature that the right of the city to enforce any right which it theretofore had should not be taken away by the repealing act.

Section 10 of the act of 1837 (35 Ohio Local Laws, page 34), provided:

> "The members of the city council shall, on the second Monday after each annual election, assemble at some suitable place in said city, and by ballot appoint a clerk, street commissioner, attorney for the city, one or more collectors, surveyors, and such other officers as the wants of the city may require. If for any cause the officers above named are not appointed on said second Monday, the council may adjourn from day to day until such appointments are made."

Section 26 of the act of 1837 provided

> "* * * and it shall be the duty of said collector to proceed in enforcing the collection of said taxes in the

> same manner, by distress and sale of personal property and advertisement and sale of real estate as is prescribed by the several acts regulating the mode of taxation in this state; * * * "
>
> 35 Ohio Local Laws, p. 40.

It will, therefore, be seen that under the act of 1837 the only officer authorized to sell real estate for the payment of delinquent taxes was the collector.

Section 1 of the act passed February 27th, 1846 (44 Ohio General and Local Laws, page 208), is a re-enactment of section 10 of the act of 1837, with the exception that the words "one or more collectors" are omitted. The whole purpose of the re-enactment of this section was to abolish the office of collector in the city of Toledo. The act of February 27th, 1846, went into effect upon its passage and, therefore, the city council, at its annual meeting in the year 1846, on the second Monday in April, could not appoint a collector, and the term of office of the one previously appointed would expire on that date, and it therefore followed that from and after the second Monday in April of 1846, the city of Toledo had not, and could not have a collector and, inasmuch as under the act of 1837 only the *collector* could sell property for delinquent taxes, the city could not enforce the payment of delinquent taxes by sale of real estate, if the act of 1837 continued to apply. This, we submit, is directly contrary to the wording, effect and meaning of the saving clause of the act of 1846, which provided:

> " * * * that all rights, titles, liabilities and remedies acquired or incurred or subsisting under and by the first-mentioned act (act of 1837), and the ordinances, resolutions and by-laws made in pursuance of the authority thereof, shall remain unaffected by the passage of this act. * * * "
>
> 44 Ohio Laws, 217.

The remedy which is meant in this saving clause, as applied to the case at bar, was the right of the city to sell real estate for the payment of delinquent taxes which had accrued under the act of 1837, and the method of enforcing this remedy could only be carried out under the act of 1846, because the office of *collector*, having been abolished, the only officer who could sell real estate for delinquent taxes was the *treasurer*.

> Sec. 5, Act 1846, 44 Ohio General and Local Laws, page 209.

Our contention, therefore, is that the act of 1837 applied at the time the improvement was made and the assessment levied, and that it continued to apply, so far as the assessment under discussion was concerned, until the passage of the act of 1846. It appears in the record, that the collection of this special tax was enjoined until the year 1846, at which time the city proceeded to apply the remedy which it was then entitled to apply, and thereupon caused the property to be advertised and sold according to the law then in force. It had no collector, because that office had been abolished and, therefore, it could not have sold the property under the act of 1837; and, inasmuch as the saving clause of the act of 1846, above quoted, had carefully preserved to the city the right to enforce the remedies theretofore subsisting, the sale was properly conducted under the act of 1846.

As stated by the circuit court of appeals in its opinion (Tr. 259) (158 Fed. 256) the charter of Toledo was amended by an act passed in 1846, and we respectfully submit that the sale of the property involved herein was properly made under this amendment.

The act of February 25, 1824, 2 Chase's Ohio Statutes, 1368, Sec. 14, is substantially to the same effect as Sec. 2852 of the Revised Statutes of Ohio, quoted by the circuit court of appeals in its opinion herein (Tr. 256) (158 Fed., 254).

Sec. 14 of the act of 1824 being as follows:

> "* * * And every person so being seized, or having the care of lands as aforesaid, as executor, and neglecting or refusing either to list or to pay the taxes on the lands of which he or she is so seized, or has the care of, shall in like manner be liable in an action on the case to the devisee or devisees of the person whose executor he or she is, for any damage which such devisee or devisees may have sustained by reason of such neglect or refusal; and every person so being seized or having the care of lands as aforesaid, either by courtesy or in dower, or for life or in the right of his wife, and neglecting or refusing either to list or to pay the tax on the lands of which he or she is so seized, or has the care of, as aforesaid, shall forfeit to the person or persons next entitled to the said lands either in remainder or reversion, all the estate which he or she so neglecting or refusing as aforesaid, may have in said lands * * *."

In a well considered opinion, the supreme court of Ohio in *McMillen vs. Robbins*, 5 Ohio, 28, held that the forfeiture provisions of the act of 1824 was constitutional and valid, and that the law was a salutary one and should be enforced.

Certainly, it would be true that to effect a forfeiture, the sale must be a valid one, and that, as held in *Estabrook vs. Royon*, 52 O. S., 318, a void sale would not work a forfeiture. We respectfully submit, however, that the record in the case under review establishes that a *valid sale was made*.

We respectfully submit that none of the Ohio authorities cited by the circuit court of appeals in its second decision herein, construed or in any wise involved the construction of legislation in Ohio enacted prior to the adoption of its present constitution in 1851, and we challenge counsel for respondent to produce any such authorities.

See also
Kahle v. Staley 74 O.S. 328

Butler Not Estopped to Take or Assert Tax Titles.

We have shown, at page 133 of this brief that Mr. Butler having entered into possession of the Toledo property, in 1843, under deed from Edward Bissell, was not estopped to acquire this tax title, or from asserting same against respondent. His indebtedness to the estate of Henry Anderson having been paid, he owed no duty to anyone but the state of Ohio and himself, and certainly no duty to respondent. His duty to the state was fully performed by paying the amount due for the taxes, and we respectfully submit he had a clear right to take the deed in his own right.

It has been decided that where there is a *bona fide* controversy with respect to title, and one of the claimants is in possession, that he owes no duty to the other to keep the taxes paid, and he may, therefore, strengthen his claim by taking the tax titles to himself.

Jeffrey vs. Hursh, 45 Mich., 59.
Coxe vs. Gibson, 27 Pa. St., 160.
Elder vs McClaskey, 70 Fed., 529. (C. C. A., 6th Cir.) Affirmed, 163 U. S., 685.

See also,

Coakley vs. Perry, 3 O. S., 344.
Keokuk vs. Missouri, 152 U. S., 301.

Statute of Limitations Took Effect When Tax Sale Was Made.

We respectfully submit that the statute of limitations of Ohio (21 years), section 4977 Revised Statutes of Ohio, now section 11219 of the General Code, cited and quoted at pagt 134 of this brief, began to run when the tax sale was made, and continued in effect until the prescriptive title was complete.

Counsel for respondent has heretofore claimed that the statute of limitations could not have begun to run against the tax title at the date of the tax sale, in 1847, because respondent was not then in being. It is elementary that title to real etsate is always vested in some one, and the title in remainder, claimed by respondent, if any such existed at the time of the tax sale, would have vested in the trustees, and in respondent at his birth.

Certainly the statute of limitations began to run against whoever owned the title, immediately upon the making of the tax sale, and if the title was then in the trustees, it is settled law that the statute having been set in operation, was not affected by the subsequent disability of any party in interest. Any other conclusion would result in holding that the state could not collect its revenues until a person not yet born came into being, and would defeat the collection of public revenues from any property, the title to which might be thus situated.

We respectfully submit that the record in this case presents questions of gravity and importance and an irreconcilable conflict of decision between the circuit court of appeals for the sixth circuit and the supreme and other Ohio courts. We further respectfully submit that the circuit court of appeals has misconstrued the will under consideration, the Ohio statutes and decisions and has denied full faith and credit to the judgments and decrees of the state courts. An ancient title to valuable real property has been disturbed, and the public confidence thereby lessened in the official records and judicial proceedings relating to land titles. The injurious results are apparent and extend in many directions. The possibility of collision is certainly imminent between state and federal authorities in the discharge of their official duties with respect

to the possesion of the property affected, by directly opposite judgments. This situation can only be relieved by this Honorable Court.

We therefore respectfully ask a reversal of the several judgments below against petitioner and that he may be restored to all things he has lost by reason thereof.

Respectfully submitted,

Harry Ebey;
Edwin W. Everett,
Edward B. Sridur

Counsel for Petitioner.

C

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

ROSEWELL E. MESSINGER,
Petitioner,

vs. No. 150

PETER ANDERSON,
Respondent.

Brief and Argument

ON BEHALF OF RESPONDENT.

RHEA P. CARY,
C. H. TRIMBLE,
Attorneys for Respondent.

E. C. TOOF & CO., PRINTERS, MEMPHIS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

ROSEWELL E. MESSINGER, Petitioner,

vs. No. 150.

PETER ANDERSON, Respondent.

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT.

The "abstract of issues and proceedings" contained in the brief filed on behalf of petitioner is substantially correct. A few inaccuracies appear therein, which it is deemed proper to correct, but with the exceptions which will now be noted, the history of the case is recounted with substantial accuracy.

The reference on page 4 of the brief to occurrences at the second trial before the United States Circuit Court at Toledo, in relation to the alleged tax titles offered by the defendant in that Court, might prove misleading. It is there stated that:

> "Messinger *proved* and relied upon title established by certain tax deeds given by the City of Toledo to Charles Butler."

That no tax title by tax deeds was *proven* or established, is perfectly apparent from the opinion

of Circuit Judge Severens on the second writ of error in this case. This opinion appears at page 250 of 158 Federal Reporter, and also at page 254 of the transcript in this case.

On page 4 of the brief for petitioner, it is stated that Anderson *voluntarily* appeared in the foreclosure suits brought by the United States Mortgage & Trust Company. This is misleading, in that it suggests that Anderson had an alternative before him, when, as a matter of fact, he had none whatever. Actions had been brought in a court which, nothing else appearing, would have been one of competent jurisdiction to foreclose mortgages upon property situated within the county in which the court sat. Mr. Anderson could have been brought in by publication, and a judgment rendered under such circumstances would have been binding on him, assuming it otherwise to have been a valid judgment. He had no alternative than to defend as best he could, or suffer his rights to be resolved against him by default.

On page 5 of the brief for petitioner, the following appears:

> "On May 6th, 1907, an execution was *duly* issued in said consolidated suits by the Court of Common Pleas of Lucas County, Ohio, to the Sheriff of that county, and was on the same day *duly levied* upon all of the property in controversy."

In the light of what this record shows, both the issuance and levy of this execution were farcical in the extreme. The execution was based upon a judg-

ment rendered against Messinger upon a mortgage executed by him to secure Emily O. Butler, dated *September* 27th, 1906. (Tr. 404.) Miss Butler had been vouched into the case at bar, and by her counsel actively participated in every trial that had been had. After the judgment of the Circuit Court of Appeals, rendered June 7th, 1906, Miss Butler lends money to the man whom she knows has been declared by the Circuit Court of Appeals to have no title to the property. She could have been nothing more than a *lis pendens* purchaser, whose judgment against Messinger, and attempted paper levy of execution based upon said judgment, upon the property involved herein, could in no wise affect or disturb the rights of Mr. Anderson.

On page 9 of the brief for petitioner it is stated, in reference to an application made by petitioner to the Circuit Court for a stay of proceedings, that this application was heard upon evidence, and that a bill of exceptions with respect thereto was taken. Reference is made to pages 291-300 of the transcript, but the copy which the Clerk furnishes us fails to show either the evidence or bill of exceptions.

Reply to Statement of Essential Facts.

We respectfully submit to the Court that the essential facts involved in the entire controversy which is before this Court for determination are contained in three opinions, the first two of which were rendered by Circuit Judge Severens, and the last by Mr. Justice (then Circuit Judge) Lurton. The first of those opinions is reported in 146 Federal, at page 929, and appears at pages 69 to 89 of the transcript in this case. The second of those opinions is also by Judge Severens, is reported in 158 Federal, at page 250, and appears at pages 254-262 of the transcript in this case. The last of those opinions by Mr. Justice (then Circuit Judge) Lurton, reported in 171 Federal Reporter, at page 785, appears at pages 612-625 of the transcript in this case.

We deem any other statement of facts, occurring either within the life time, or after the death of Henry Anderson, as wholly unnecessary.

Counsel for petitioner, however, have seen fit to set out with great elaboration of detail statements of supposed facts, with all of which we cannot agree, and therefore feel it necessary to call attention to some of the inaccuracies appearing therein.

It is stated on page 13 of the brief for petitioner that Charles Butler, after February 22d, 1843, was continuously in possession and control of the property involved herein, *and paid all of the taxes and assessments* thereon, until a sale made by Butler in 1860. This statement is clearly refuted by the tax deeds offered in evidence by petitioner, and upon

which petitioner based a claim of title. These tax deeds would never have been executed unless default had been made in the payment of taxes. If Mr. Butler was in possession and claimed title to the property, it was his duty to pay those taxes, and notwithstanding the fact that he first failed to pay the taxes, thus violating a duty which he owed, and then sought to take advantage of his own wrong by basing thereon a claim of title, growing out of his own delinquency, one of his successors in his supposed title now claims for him that he paid all of the taxes and assessments.

It is stated on page 17 of the brief for petitioner that "*the fact*" that Anderson held the Bissell property, including the premises in controversy here, in trust to secure a debt from Butler, *was fully investigated*. The full investigation referred to is not shown by the record, and the claim of Anderson's holding the Bissell property in trust for Butler was denied by the Circuit Court of Appeals, and held to be unfounded. Therefore, unless the Circuit Court of Appeals erred, there was no such fact.

On pages 17 and 18 of the brief for petitioner it is stated that the plaintiff below introduced certain documents. The utmost fairness to the respondent here would, it seems to us, have demanded that an additional statement be made of the purpose of the introduction by the plaintiff below of this evidence. The purpose appears at the top of page 567 of the transcript, and is there stated to have been solely to show that the relation of mortgagor and

mortgagee existed between Butler and Anderson, up to October 1st, 1852, and that by reason of this relation Butler was obliged to pay the taxes.

There are other inaccuracies in the "abstract of issues and proceedings," and also in the "statement of essential facts." We deem it unnecessary, however, to specify further, because of the fact that a careful examination of the record is essential to a thorough understanding of the case and the issues involved.

BRIEF AND ARGUMENT.

We shall reply to the portions of the brief for petitioner, as nearly as may seem necessary or proper, in the order and under the headings adopted and used by the petitioner, or to such portions of them as we deem it necessary to consider.

"The Circuit Court of Appeals Erred in Its Construction of the Anderson will."

Petitioner quotes, disjointedly, various portions of the will of Henry Anderson, the proper construction of which was the first vital question to be considered in this case. The material portions of the will are quoted in the opinion of Circuit Judge Severens, appearing at pages 75, 76 and 77 of the transcript in this case. Those portions are as follows:

> "I, Henry Anderson, do make and ordain this to be my last will and testament. I declare my domicile to be the town of Holly Springs, Marshall County, State of Mississippi. I revoke the will made by me on the 3d of March, 1837, and all other wills, if any there be.
>
> Item. I give, devise and bequeath to Peter Anderson, Walter Goodman and Peter W. Lucas all my property, both real and personal, legal and equitable in possession, reversion or remainder, and all claims and demands whatsoever, except such right, title or claim to land, money or choses in action as I may be entitled as one of the agents of the American Land Company and as one of the stockholders of said company; this property they shall hold in trust, and if one or more of them die, the survivors or survivor shall hold in trust for the following

purposes: They shall pay my debts, other than such as may be owing to the American Land Company, out of moneys on hand and such property as may be sold least injurious to my estate. I wish them to collebt debts due to me and apply to this purpose. They may, if they think fit, and can, obtain an extension of time on any debt, and they may pledge my property to raise money to pay debts. They may sell for cash or on credit, and if at any time they have funds on hand not required for debts or legacies they may invest the same. They shall have full power to make titles for property sold and to pay charges for preservation, and in all respects have the power of owners, but always as trustees. I have entire confidence in each of them, and therefore give each the power of all, so that each may do separately what all acting together may do, except in making investments; in that I wish all to join. The annual accounts of my said trustees, signed by their respective names, shall be binding on my heirs and shall be conclusively so unless error or fraud be clearly established. I have directed the payment of debts other than what I may owe the American Land Company. I exclude the debts to the company, because that is subject to an account with the company, and I do not wish my trustees to make payments before that account is adjusted. The adjustment of that account and the direction and management of the affairs of the company, so far as I have power, right or interest, I place in the hands of Peter Anderson and Walter Goodman, and when they have finally closed it, it shall become a part of the trust created by this article of my will and subject

to the control of my said trustees. By saying 'it shall become a part of the trust,' I mean the effects and proceeds that I may be entitled to as stockholder and agent of the company. * * *

Item. It is my will that when my son William arrives at the age of twenty-one years the trustees of the first and general trust shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one-half of my property, reserving thereout two-fifth parts of, said moiety by valuation, which my said trustees shall hold in trust and properly invest and pay over to him at the age of twenty-five years. If my interest in the American Land Company be not brought into the general trust at the time William becomes twenty-one, but is brought in at any time before he arrives at twenty-five, so soon as brought in, two-fifths shall be deducted therefrom and invested and paid over to him at twenty-five, the other three-fifths he shall have as soon as paid in. I find the above does not express my will in this: When I say two-fifths shall be deducted from the interest I may have in the land company for investment, and three-fifths to be paid to him, I mean two-fifths of a moiety shall be deducted and three-fifths of a moiety paid over.

And it is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective periods of twenty-one and twenty-five years of age, being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be gov-

erned in all other respects by the regulations laid down concerning the same.

If either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, *and if the survivor dies without lineal descendants*, then one-half both of the decedent's original portion, as well as one-half of the portion taken by survivorship, shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother Peter be not living at the time of the death of my surviving son, *so dying without lineal descendants*, then the share he would have taken, if living, shall go to his children, living at the time of the decease of my said son, and if there be no children surviving, then the share shall go to my other brother and sisters surviving at the time of such decease of my son. I make the following explanation: *The limitation over* on the death of my surviving son *without lineal descendants* is intended to take effect *if there be no lineal descendants living at the time of the decease of such son.* Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions *by will* on their attaining the age of twenty-one years, respectively. *The above limitations over shall give way to the provision of such wills.*"

It is argued that the decision of the Supreme Court of Ohio in Anderson v. United Realty Company, 79 Ohio State 23, which was, in its results to the respondent, diametrically opposite to that which

was reached by the Circuit Court of Appeals, was in accord with a "long settled rule of property in Ohio." As sustaining this contention, counsel cite various cases decided by the Supreme Court of Ohio, and one from this Court. Each one of these cases, with the exception of Martin v. Lapham, in 38 Ohio State, and Anderson v. United Realty Company, in 79 Ohio State, was considered by Judge Severens in his opinion on the first writ of error (Tr. 69-89), and each was distinguished from the case at bar. Yet we feel that it might perhaps be helpful to further briefly show the points of distinction between those cases on the one hand, and Shaw v. Hoard and the case at bar, on the other hand.

In the case of Parrish v. Ferris, 6 Ohio State 563, the only part of the will under construction which bears even a remote resemblance to the will involved here, reads as follows:

> "If my daughter, Lucinda A., shall die without children, then and in that case, I give and bequeath said lands to my brothers and sisters, their heirs and assigns forever, after the death of Lucinda A., as aforesaid."

This case is in no wise in conflict with Shaw v. Hoard, or Anderson v. Messinger. The daughter died without issue, and the brothers and sisters of the testator took. This case is utterly worthless to illuminate the one at bar.

In the case of Niles v. Gray, 12 Ohio State 320, the only portions of the will in any sense resembling the one now under construction are as follows:

> "I give and bequeath unto my youngest daughter, Margaret Harper, the remaining part of my real estate. * * * It is also to be understood that should my youngest daughter, Margaret Harper, die without any legitimate heirs, her part of my real estate shall fall to my eldest son, Matthew Harper."

There is absolutely nothing in the will but this, so far as concerns any possible point now under construction. We submit that it throws not even a ray of light upon the construction of the present will.

The case of Taylor v. Foster, reported in 17 Ohio State, is not available to us, as we write this brief. The seventeenth volume of the Ohio State reports has been removed from the library, presumably for purposes of rebinding, and we have not access to it.

However, the cases of Parrish v. Ferris, Niles v. Gray, and Taylor v. Foster, were all decided prior to Shaw v. Hoard, 18 Ohio State 227, and it must follow that none of the cases named were in conflict with Shaw v. Hoard. If either Parrish v. Ferris, Niles v. Gray, or Taylor v. Foster, or all of them, established a rule of property in Ohio, applicable to the facts of Shaw v. Hoard, it is fair to presume that the Court would, in Shaw v. Hoard, have followed that established rule of property. It is also inconceivable that, unless the three cases named

were easily and clearly distinguishable from Shaw v. Hoard, they would have been disregarded and not even referred to.

In Piatt v. Sinton, 37 Ohio State 353, the testator devises "all of my property, of every description" to Lucinda Piatt. * * * "In case the said Lucinda should die without legitimate heirs of her body," then the same property should go over to others, who were named. The Supreme Court of Ohio construed the words "all of my property" to be the equivalent of the words: "All my estate." The heirs of the body of Lucinda Piatt were strangers to the blood of the testator. That case not only does not overrule or criticise, but does not even mention Shaw v. Hoard, clearly showing that it affords no light upon the proper construction of the will in the case at bar.

In the case of Martin v. Lapham, 38 Ohio State 538, the language of the will, after bequeathing six hundred dollars to Mary L. Lapham, is as follows:

> "It is my will that if Mary L. Lapham shall die leaving no children of her own, then and in that case, the sum of six hundred dollars bequeathed to her herein shall be equally divided among my living children, issue of my body."

It is quite apparent from a mere quotation of the language of this will, that it is of no benefit in arriving at the construction of the will in the case at bar.

In the case of Collins v. Collins, 40 Ohio State 353, the portions of the will involving some possible and remote analogy to the questions raised in the case at bar, were all contained in Item First, which reads as follows:

> "I give and devise to my beloved wife, in lieu of her dower, the farm on which we now reside * * * during her lifetime; and all of the household goods that I may be in possession of at my decease, are to remain in the possession of my widow during her lifetime. At the death of my said wife the real estate aforesaid, and such household goods as may then remain unconsumed and unexpended I give and devise to my two sons, Silas and William Collins, *and their heirs.* If, however, either of my said two sons should die, leaving no children at their decease, then the share of said property above devised to such deceased son, is to go into the possession of the surviving son. If, in case both of my two sons, Silas and William Collins, should die, leaving no heirs, then the property above described to be equally divided among my heirs. * * * "

The Court said:

> "In our view by clear and unequivocal terms in the second clause of the first item of the will, William took a vested remainder in fee simple, in one undivided half of the homestead farm; and, as the contingency upon which his estate might be decided became impossible, it cannot be cut down to a life estate by any construction given to the subsequent clauses."

Thus, the lack of application of Collins v. Collins to the case at bar, is obvious.

In the case of Durfee v. McNeil, the clause of the will up for construction, read as follows:

> "I give and bequeath all of the balance of my estate, after defraying expenses, to be divided equally between my wife, Pauline M. Durfee, Elisha Brightman Durfee, and the child with which my wife is now enciente, share and share alike, *and to their heirs forever*, and should the child with which my wife is enciente, not be born alive, or should either die without heirs, capable of inheriting, all such one's share and legacy under this will, shall enure to the survivor, and should I be without heirs of my body, then the legacies of my children shall vest in my wife."

The opinion in that case was delivered by Judge Shauck, now a member of the Supreme Court of Ohio, and also on the bench when Anderson v. United Realty Company, 79 Ohio State, was decided. The phraseology quoted shows conclusively that the decision had no bearing upon the questions involved in the case at bar. This statement is corroborated and strengthened by the fact that in Durfee v. McNeil, no mention whatever was made of any of the cases which we have heretofore reviewed, or which are cited in any portion of the brief for petitioner.

The case of Anderson v. United Realty Company, 79 Ohio State 23, is cited on page 69 of the brief for petitioner, following the citation of all the cases which we have just reviewed and endeavored to distinguish from the case at bar. These cases are all

cited to sustain the statement in the brief for petitioner that:

> "We respectfully submit that this construction and decision are wrong, and contrary to a long settled rule of property in Ohio."

Had these cases, as contended by counsel for petitioner, established a long settled rule of property in Ohio, it is fair to presume that Judge Summers would have so stated in his opinion. Not only is there nothing of the sort suggested in the body of the opinion, but the second syllabus (presumably prepared by the Court) is as follows:

> "Where, in a will, there is a devise to a son, and if he dies without lineal descendants, living at the time of his decease, then over, *these words are not, by themselves, without assistance from other parts of the will*, sufficient to create an estate by implication in the lineal descendants."

In addition to this, Judge Summers admits that:

> "The case of Shaw v. Hoard, et al., 18 Ohio State 227, supports the contention of the plaintiff."

True, Judge Summers states that Shaw v. Hoard is contrary to the current of authorities, and that it appears to have been decided without reference to any decisions, and upon the particular facts of that case, as showing the intention of the testator. But he does not say that any settled rule of property has been created in Ohio, a thing which he naturally

would have said, had there been such. He states that it is in conflict with other well considered decisions of that Court, but we have undertaken to show that it is not, and believe that in our effort we have been successful. Certain it is that the Circuit Court of Appeals agreed with us in this insistence, and we believe that a fair and full consideration of all of the Ohio cases will result in this Court adopting the same view.

It is worthy of note that only five of the six judges of the Supreme Court of Ohio sat in Anderson v. Realty Company. Judge Summers rendered the opinion, and Judges Shauck and Spear and Chief Justice Price concurred. Judge Crew did not participate in the case, and Judge Davis dissented. We especially commend to the careful consideration of the Court the dissenting opinion of Judge Davis, from which we quote as follows:

> "It seems to have been conceded at every stage of this case that Shaw v. Hoard, 18 Ohio State 227, if adhered to, would control the judgment in the present controversy; but the Circuit Court passed over it with the remark that it had been ignored if not substantially overruled in cases following Niles v. Gray, 12 Ohio State 320. It is also stated in the conclusion of the majority opinion that Shaw v. Hoard is in conflict with Niles v. Gray, and subsequent cases, which follow the latter. I have no difficulty in distinguishing, to my own satisfaction, Shaw v. Hoard, from Niles v. Gray, and cognate cases. Indeed, it has always seemed to me that the distinction was very plainly indicated by the

> Court in Carter v. Reddish, 32 Ohio State. * * * But I waive further elucidation of this proposition, because from my point of view the question as to the nature of the estate devised by this will is simply academic. It is a matter of no difference whether it be a life estate, or a determinable fee, because in either case the only power of disposition intended by the testator is by will. * * * That is to say, the testator gives to his sons the power of appointment by will, and except in that way only, the property devised cannot be diverted from the family line prescribed by the testator. Whether each of the sons took an estate for life, or fee simple, determinable on the happening of the contingency, could not defeat the devolution of the property within the family, as prescribed by the testator, except by appointment in a will. I will not discuss this proposition further than to say that this clause of the will stands out as prominent as the Washington Monument, and it cannot be ignored in any fair construction of the will.

As indicated by Judge Davis in his dissenting opinion, the case of Carter v. Reddish, 32 Ohio State, practically reaffirms Shaw v. Hoard. In this connection, Judge Severens said, of Carter v. Reddish, that in it:

> "The Judge (Chief Justice Day) who delivered the opinion of the Court in Shaw v. Hoard, was a member of the Court. No intention to overrule the case of Shaw v. Hoard is indicated, nor is the case mentioned. But Judge Scott, who delivered the opinion, *distinguishes a case involving the facts of Shaw v. Hoard.*

After referring to the cases of Parrish v. Ferris, 6 Ohio State 563, Niles v. Gray, 12 Ohio State 320, cases upon which the later decisions referred to rest, Judge Scott said:

'Still, we should have no hesitation in finding, from the language of the will before us, that the testator intended a life estate only for the first devisees, if the sole condition of the limitation over to the nephews and nieces had been the dying of his children, without issue, and without reference to the time when they should die. But such is not the language of the will.'

The difference was that the case supposed was the case, in its facts, of Shaw v. Hoard, and of this case, while in the case in which the Judge was giving the opinion, the devise over was on the contingency of the first devisees dying within age, and without lawful issue. The distinction rests upon the fact that the contingency upon which the life estate would terminate was uncertain after the first beneficiary might attain the age of twenty-one and have children, in which event there would be no remainder, for both conditions would not happen. And, as we have said, the remainder must depend upon a contingency which must happen.''

We have thus reviewed every case in Ohio, which we understand counsel for petitioner to claim has any possible bearing upon the case at bar. We have endeavored to show the vital and obvious points of differentiation, between those cases, and the instant one, and believe that we have successfully distinguished them.

We make no reply whatever to the subheading in the brief for petitioner dealing with definite and indefinite failure of issue, because, in our conception, it has no proper place in the construction of the will herein involved.

On page 80 of the brief for petitioner appears a long list of cases, which it is supposed show the decision of the Circuit Court of Appeals in this case to be contrary to the decisions of the highest courts of the states of Alabama, Illinois, Indiana, New Hampshire, New Jersey, Maryland, Missouri, Nebraska, North Carolina, Vermont, Virginia and West Virginia.

We have examined each and every one of these cases, and have carefully compared the wills therein involved with the one up for construction in the case at bar. Without extending this brief to an unjustifiable length, we state unhesitatingly that the points of distinction between each of said wills and the one in the case at bar are clear and unmistakable, and will be readily apparent to any one who takes the trouble to examine them.

In his opinion on the last writ of error Mr. Justice (then Circuit Judge) Lurton said as follows:

> "That this Court did not depart from any well settled line of decisions by the Supreme Court of Ohio, applicable to the construction of the devise in the will of Henry Anderson which was involved, will be quite apparent upon an examination of the opinion of this court, as re-

ported in 146 Federal 929, and a comparison with the opinion of the Supreme Court of Ohio, construing the same clause, as reported in 79 Ohio State 23.

We found in the case of Shaw v. Hoard, 18 Ohio State 228, an exposition of the applicable law of Ohio, which the opinion of the Supreme Court of Ohio by Judge Summers concedes, 'supports the contention of the plaintiff.' We concluded from an examination of later cases in that court, that while in some particulars not relevant to the will of Henry Anderson *Shaw v. Hoard had been distinguished, but had not been overruled.* The Supreme Court of Ohio in Anderson v. United Realty Co., seems to conclude that, in effect, Shaw v. Hoard had been so far modified or distinguished as not to be conclusive evidence of the law in Ohio. Assuming for the purpose of this case that the effect of later decisions which did not expressly overrule that case was to unsettle it as a rule of decision, it clearly left the law of Ohio, considered as a local rule of property applicable to the words of the devise involved, in such an uncertain state as to compel this Court to apply to the will the settled rules of the common law applicable. Upon this aspect of the matter Judge Severens said, that 'if it should be held that the rule of construction is not settled, this Court would decide the question upon its own understanding of the law applicable to it.'

But it has been urged that we may not look to the opinion of the Ohio court for the purpose of determining the law of the case, but only to the syllabi of the case. The Ohio court has long since adopted a rule, that the law of the case

by which the Court is bound is that stated in the syllabi of the case. See Rule 6, 5 Ohio State, page 7 of the preface, and same rule, page 10, preface, of 73 Ohio State.

If we accede to this, we find no rule of property there stated which necessarily conflicts with the opinion of this court.

The syllabus reads as follows:

'Where, in a will, there is a devise to a son, and if he dies without lineal descendants, living at the time of his decease, then over, *these words are not, by themselves, without assistance from other parts of the will*, sufficient to create an estate by implication in the lineal descendants, but the son takes a fee defeasible upon his death, without lineal descendants, living at the time of his decease, and in the event of lineal descendants living at the time of the son's death, his fee becomes absolute, and such descendants have no interest under the will as against his grantee.'

This court found 'assistance from other parts of the will,' in reaching the conclusion we did, as will be seen by consulting the opinion. It will also be noticed that *the opinion of the Ohio court* as exhibited by that of Judge Summers, *does not deal with circumstances to which we attached importance.*

But if we confine ourselves to this syllabus, *it is impossible to say that* from it alone *we should* be able to *treat the decision as a declaration of the settled law of Ohio*, constituting a rule of property, which this court ought to follow. *It is apparently no more than an interpretation of a particular will*, and as such, under the cases cited above, is not such a decision as

we are under obligation to follow as a local rule of property.

There is, however, another reason why we should not now, if we had the power, retract our own opinion and adopt the subsequent view of the Ohio Supreme Court. This is found in the fact that *there was then no settled line of decisions by the Ohio court applicable to the devise we were called upon to construe*. This was a controversy between citizens of different states, and when, as was our duty, we reached a conclusion upon common law principles in the exercise of our independent judgment, we are now under no obligation to recede from that opinion merely because in another case the Supreme Court of Ohio has since reached a different result. Burgess v. Seligman, 107 U. S. 20, 33, 35."

Following the above enunciation by the Circuit Court of Appeals, the case of Burgess v. Seligman, 107 U. S. 20, was cited, and quoted from at considerable length. We believe the following from Burgess v. Seligman to be peculiarly apt in the case at bar, and its unusual pertinency is obvious when considered in the light of the litigation launched by the United States Mortgage and Trust Company, much of which appears in the record. The quotation referred to is as follows:

"As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between the citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudice and sectional views, it would be a dereliction of their

duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

The record of the United States Mortgage and Trust Company litigation is a shining example of the wisdom of those who conceived the thought of vesting the national courts with jurisdiction to administer the laws of states, in controversies between the citizens of different states. It is a glowing tribute to the forethought of those who evolved the theory of the settlement of controversies between citizens of the different states, by independent tribunals, which would be free from local prejudice.

Various cases are cited in the brief for petitioner, which are submitted as showing that the construction placed by the Circuit Court of Appeals upon Henry Anderson's will was against the weight of authority. The simple answer to all of them, without taking the time, or consuming the printer's ink to review them, is that not one of the wills involved in any of the cases cited, bears more than a faint resemblance to the Anderson will.

Counsel refer to the case of Bond v. Moore, 236 Illinois, 576, as opposed to Anderson v. Messinger, 146 Federal 929. It is true that Judge Dunn, who delivered the majority opinion of the Court in the case, declined to follow Anderson v. Messinger, but is is perfectly clear, from a reading of his opinion, that he had a total misconception of Judge Severen's opinion. The most casual reading of Judge Dunn's opinion, and a comparison of it with the opinion of

Judge Severens, will demonstrate that Judge Dunn wholly misconceived the latter.

We desire to especially call the attention of the Court to the dissenting opinion of Judge Carter, of the Supreme Court of Illinois, which appears on pages 594 to 608 of 236 Illinois, in which dissenting opinion, Judges Hand and Farmer concurred. In that dissenting opinion Judge Carter approves Anderson v. Messinger, and demonstrates that it should be followed. The same thing may be said of his treatment of the case of Shaw v. Hoard. Judge Carter also refers to several other cases, none of which have been discussed heretofore in this litigation. These cases furnish, if it were needed, further basis for the support of Judge Severens' opinion, and are as follows:

Holton v. White, 23 New Jersey Law.
Lytle v. Beveridge, 58 New York 592.
In re Moore's estate, 11Misc. (N. Y. Delehanty), 436.
Bentley v. Kaufman, 12 Philadelphia 435.
In re McAlpin's estate, (Pa.) 60 Atlantic 321.
Beilstein v. Beilstein, 194 Pennsylvania State 152.

Judge Carter says (page 606), that:

"The weight of American authority is against the construction of the will upheld by the majority opinion of the Court. * * * It is the Court's duty to construe wills as they find them, and not to make them. * * * While the doctrine of implication must be resorted to cautiously in the construction of wills, the Courts should not hesitate to resort to that doctrine,

> when thus only, can the manifest intention of the testator be carried out. * * * The testatrix, without question, intended that her son should have only a life estate in her property, with the right to control and manage it, and with a right to use sufficient of the proceeds for his support and comfort; but is it not a most violent inference that she intended that if he had children that he should have a fee simple instead of a life estate?''

As an original proposition, we submit that, in the very nature of things, it would be impossible to establish a fixed and settled rule for the construction of wills, *except in cases of either literal or practical identicality of language*. All of the courts agree that the first and cardinal rule in the construction of wills is to ascertain the intention of the testator. It must necessarily follow that the use of one set of words by one testator, could by no possibility serve as a basis for a fixed rule by which to determine what was meant by another testator, who uses different language from that first construed. No two wills that were ever signed and executed were alike. Each differs from every other one in some particular. It would seem to be utter folly to say that a determination of the intention of a testator would be aided by reading what some court has said was meant by another testator, unless that thing happened which, so far as our researches have gone, has never happened, namely, that the testators used exactly the same language. Each word has its different shades of meaning. The juxtaposition of words, although the same

ones are employed, will result in a different idea being conveyed. Therefore, each particular will must be construed and interpreted according to its own contents, if there is to be avoided the substitution for one testator's intention that of another.

Circuit Judge Severens, in his opinion on the first writ of error, forcefully emphasizes the bearing which various portions of the will have upon a testator's intention. We repeat Judge Severens' language in this regard here:

> "But, pursuing the inquiry above suggested, we see that the testator emphasizes the alternative he had stated by adding: 'I make the following explanation: the limitation over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son.' It is observable that his explanation relates to the death of the surviving son. He plainly intends that the presence of lineal descendants at that time shall block the way to a devise over to the next preferred classes of relatives. And he repeats the designation of 'lineal descendants' instead of 'heirs.' He certainly intended that if such persons were living the estate should go to them in some character, and he gives them a peculiar designation. Then again, if a fee simple was intended to be vested in the sons, words of inheritance must be implied in the gift to them, as if the gift run to him, his heirs and assigns, in express terms. To be in harmony with this, the defeasance would naturally have been incident to his dying without heirs, and it would follow that the tes-

tator used the expression 'lineal descendants' as a synonym for 'heirs' which we must think an inadmissible proposition. The recent case of Home v. Lippardt, 70 Ohio State 261, is pertinent to this discussion. In that case, the testator, as here, gave his estate to the first taker in general terms, later on he gave him a qualified power of disposition. And the court said: 'The clear implication of such a bequest, taking all the parts together, is that B. (the first taker), is to possess a life estate. Here a life estate is implied, and is not expressly created.' The power to dispose of the property was not inconsistent with the gift of a fee simple. It was an incident of such an estate. But the court laid hold of it as an implication that the testator intended only a life estate in the first taker. It certainly was not an absolutely necessary one. It was necessary only for the purpose of giving effect to the apparent intention of the testator.

There is another consideration which must not be ignored. The authorities recognize a more significant purpose in an implication which tends to cut down a larger estate to a life estate where the remainder thereby passes to a person who is in the line of descent than it would if it were to pass to a stranger. This results from the stronger motive which the testator would have to prefer the former to the latter class."

To this demonstration by Judge Severens of the true intent of the testator, little, if anything, can be added with effect. It may not be amiss to call attention to the fact that in the vital clause in this will, almost without variation, the possible death of either

son of the testator is each time referred to in connection with the absence of lineal descendants. The testator says: "If either of my sons die *without lineal descendants*, the one surviving shall take his estate above bequeathed, and if the survivor die *without lineal descendants*, then," etc., etc. He further says: "If my brother Peter be not living at the time of the death of my surviving son, so *dying without lineal descendants*, then," etc., etc. He further says: "The limitation over, on the death of my surviving son, *without lineal descendants*, is intended to take effect, if there be no lineal descendants living at the time of the decease of such son."

An analysis of this clause will show the following facts: First, The survivor of the two sons was to take nothing from the one first dying, unless the deceased left no lineal descendants. Second, The brothers and sisters of the testator were to take nothing, if the surviving son died leaving lineal descendants. Third, The testator's brother Peter would take nothing, if either of the testator's sons died leaving lineal descendants. Fourth, The limitation over on the death of his surviving son without lineal descendants could not take effect if there were any lineal descendants living at the time of the decease of his son.

It would seem to the common understanding, that the testator, having in so many instances and by so many safeguards, hedged about the dangers of disinheritance of his grandchildren, which he foresaw might occur in the devolution of his property, must have had firmly fixed in his mind a purpose and

intention to provide for any grandchild that he might leave. The survivor of his two sons was to get no more than a half interest, unless the son first dying left no children. What was the reason for this, unless it was to provide for the grandchildren? His brother Peter, for whom he seemed particularly solicitous, was to get nothing if any grandchildren were left. And then, as if he had not made his meaning clear, he incorporated in his will an explanation wherein he expressly stated that the limitation over to the collateral line, on the death of his surviving son without lineal descendants, could not take effect, if there were any children living when that surviving son died.

Petitioner's Construction of the Will Impossible Because of Destructive Effect of Power of Disposition Upon Executory Devise.

> "The defendant claims that the testator intended that each of the two sons of the testator took an estate in fee simple which would be defeated if the survivor died without lineal descendants, whereupon the testator's brother, Peter, and the other collateral relatives, would take the estate by way of an executory devise."
>
> Anderson v. Messinger, 146 Federal 929.

The will in question contains this provision, which we have already quoted, but which we here quote again in order that we may the more clearly illustrate the point now desired to be made:

> "The limitation over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of said son. Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years, respectively. *The above limitations over shall give way to the provisions of such wills.*"

Of an executory devise, Chancellor Kent uses the following language:

> "Nor can an executory devise or bequest be prevented or disturbed by any alteration whatsoever in the estate, out of which or subsequently to which it is limited. *The executory interest is wholly exempted from the power of the first beneficiary or taker.*"
>
> 4 Kent's Commentaries 270.

In the case of Jackson v. Bull, 10 Johnson 19, it is said:

> "*A valid executory devise cannot be defeated at the will and pleasure of the first taker.* This is a settled principle. It cannot be barred by a common recovery, or by any other mode of alienation." Citing Peters v. Brown, Cro. Jac. 590, 1 Salk. 290.

In the case of Burleigh v. Clough, 52 New Hampshire 275, it is said:

> "We cannot so well express the definition and character of an executory devise as by adopting the language of the learned counsel for the appellee, in argument: 'An executory devise is a future interest, such as the rules of law do not permit to be created in conveyances, but allow in the case of will, like an interest given after an estate in fee simple, or to arise *in futuro* without a particular estate to support it. Scatterwood v. Edge, 1 Salk. 229. They came into use after the Statute of Wills, 32 Hen. 8, and were allowed out of indulgence to testators, that they might, without the intervention of trustees to preserve remainders, establish future interests in strict settlement beyond the reach of those who had the prior estates—4 Kent 260; and such being the object, it was held to be *essential to a good executory devise that the first takers should have no power to dispose of the interest devised.* If, therefore, the first taker had the power by grant from the testator to dispose of the executory devise, the power defeated the whole object of such devises, and was held to make them inoperative though the power was not executed.
>
> Every good executory devise, as the rule

would seem to be established in England, is 'inalienable, though all mankind join in the conveyance.' Scatterwood v. Edge, 1 Salk. 229; 4 Kent 260; 6 Cruise's D. 461, 465. For this reason a power of disposition has been held to be inconsistent with the nature of such an interest."

From the foregoing authorities, we think it clear that two propositions are demonstrated:

First, that the power of disposition was utterly repugnant to and destroyed the supposed executory devise over to the brothers and sisters of the testator, in case the surviving son died without issue.

Second, the fact that the power of disposition, by will, vested in the survivor, created only a life estate in him, by necessary implication.

The application to this case is obvious. The power of disposition by will, vested in the survivor, made it impossible that the brothers and sisters of the testator should ever take as executory devisees. That power of disposition is repugnant to an executory devise, and is consistent with the theory of a life estate. The collateral kindred must take, if at all, as remainderman.

It was the obvious intention of the testator that they take in certain contingencies in some capacity. It also follows, as a consequence, that whatever the will did, it did not create a base fee in the sons of the testator.

Bear in mind that the will vested the estate in the first takers, that is, the sons, in general terms, without using words of inheritance sufficient to specific-

ally and absolutely create a fee, and that it is evident that it was the intention of the testator that his collateral kindred should in certain events take in some capacity. To hold that they could take only as executory devisees would be to defeat his intention altogether and absolutely destroy the whole will as to them. The only way to construe the will so as to make it effectual as to them is to give them remainders contingent upon his sons dying without issue, and when we remember that the general rule is that future interests will be construed, where possible, as remainders rather than as executory devises, it seems to us there is no escape from the conclusion that such a construction must be put upon the will. If it is construed as creating contingent remainders in his collateral kindred, this necessarily implied a life estate in the first taker, with remainder in his sons or other lineal descendants.

It would appear that the effect of the power of disposition by will, vested in his sons, is radical and very far-reaching, and serves to put this case far beyond the pale of all of the cases relied upon for the petitioner and makes a vastly stronger case for the plaintiff than Shaw v. Hoard and Carter v. Reddish. Indeed, it makes it apparent that it is absolutely necessary to give any effect at all to the intentions of the testator to construe the will as creating a life estate in the first taker with remainders over.

It is perhaps necessary to make one other observation.

If only a life estate is granted, a power of disposition in the life tenant does not invalidate a remainder over.

In Kelly v. Meins, 135 Mass. 234, the rule is stated thus:

> "Where land is given *absolutely to one person* with a gift over to another, of *such portion as may remain undisposed of* by the first taker, the gift over is void as repugnant to the absolute property first given. * * * But when a *life estate* only is given to one person, with a power to dispose of the land in which the life estate is given, and on the death of the first taker, the portion of the land undisposed of is given to another, the gift over is valid, and takes effect as to all the land remaining undisposed of on the death of the life tenant, as a remainder."

In the above case, the will, by express words of inheritance, vested a *fee* in the first taker; and the Court said:

> "As the estate of Meins cannot be cut down to a life estate, it follows that the limitation over is void."

In Ramsdell v. Ramsdell, 8 Maine 205, it is said:

> "Where a life estate only is clearly given to the first taker, with an express power, on a certain event, or for certain purposes, to dispose of the property, the life estate is not, by such a power, enlarged to a fee, or absolute right, and the devise over will be good."

The above case refers to Larned v. Bridge, 17 Pick. 339, where the life estate was created by the

plication, and not by express words, and the remainder held good.

Burleigh v. Clough, 52 N. H. 73, before cited, is an authority for our whole contention. It was a case of a devise for life, with a general power of disposition and a devise over "of what remained undisposed of." It was held that the power of disposition precluded the idea of an executory devise, but the intent of the testator was effectuated by calling the future interest a remainder.

In examining the cases we have cited and the authorities to which they refer, it is essential to bear in mind that the will of Henry Anderson contains no words of inheritance sufficient to expressly vest a fee in the first taker, and that the power of disposition in the sons is not general, or absolute, but limited.

Burleigh v. Clough, 52 N. H. 73, before cited, is that the intention of the testator would be defeated by construing the will to vest a base fee in James H. Anderson, but that it can be effectuated by construing it to vest a life estate in him. If he had only a life estate his son took a remainder, and in any event, he being a life tenant could not cut off his son or any other remaindermen by his deed, and petitioner's title fails.

The language, "the above limitations over shall give way to the provision of such wills," neither added to nor took from the power of disposition. It was a species of tautology, and serves only to make perfectly certain that an executory devise founded upon a fee is impossible in this case.

Alleged Destruction of Petitioner's Record Title by Incompetent Evidence.

Pages 100 to 102 of the brief for petitioner are devoted to an argument intended to establish that the contract of October 4th, 1844, was incompetent evidence, and that by this incompetent evidence petitioner's record title was destroyed, in violation of his rights.

At the outset of a discussion of this proposition, we desire to call the attention of the Court to the fact that on the first trial of this cause, in the Circuit Court at Toledo, the petitioner himself offered in evidence this contract of October 4th, 1844, which is referred to in the record as "Exhibit E" to stipulation No. 1. (Tr. 12).

This much discussed contract was really introduced by both parties on the first trial. (Tr. 11-12.) It was introduced by the plaintiff below *without objection upon the part of the defendant* (the petitioner here). In addition to this fact, and apparently not content with its introduction by the plaintiff below, the defendant there also introduced the contract himself.

The petitioner by his own introduction on the first trial, of this contract, and his voluntary submission of the question affected by this particular piece of evidence, for decision to the Court, and the subsequent *final adjudication* of this question by the Circuit Court of Appeals, would seem to be now estopped from objecting to the incompetency of evidence which he himself had formerly introduced and re-

lied upon. If (to quote from the opinion on the last writ of error):

> "The finality of the decision of this Court (Circuit Court of Appeals), so far as it did decide any question, is not affected by the fact that it was a judgment reversing the judgment of the lower court, and directing a new trial,"

then the question was at that time adjudged against the petitioner, and he could not thereafter complain, because he is precluded by his own act of submission of the question to the Circuit Court and the judgment of the Circuit Court of Appeals upon such submission.

Although it may serve no purpose but an academic one, we feel fully prepared, upon the authorities, to meet the issue raised by petitioner's counsel as to the competency or incompetency of this evidence.

The first case cited by counsel for petitioner to sustain the argument that this contract was not competent evidence was that of Dodge v. Freedmen's Savings and Trust Company, 93 United States 379. In that case, it was sought to introduce the declarations of one W. S. Huntington, whom this Court stated never had any title to the premises whatever, but only occupied one of the houses described in the trust deed for a portion of the time as a tenant, and for the balance of the time under a verbal agreement to purchase from Dodge. This Court said, in respect thereof:

> "The declarations of a party in possession of land are competent evidence, as against those

claiming the land under him." (Citing authorities.)

In Rose's Notes to 93 United States, this case is stated to have been explained in Dooley v. Baines, 86 Virginia 648, where that Court held that declarations by one in possession, in disparagement of his title, are admissible against those claiming under him.

Mr. Wigmore, in his last Work on Evidence (Volume 2, Section 1080) says, of admissions of privies, as follows:

> "The admissions of one who is privy in title stand upon the same footing as those of one who is privy in obligation. Having precisely the same motive to make correct statements, and being identical with the party (either contemporaneously or antecedently) in respect to his ownership of the right in issue, his admissions may, both in fairness and on principle, be preferred in impeachment of the present claim. * * * This principle is today nowhere denied, except in one traditional respect in New York, firmly fixed too long ago, to be now discarded."

Mr. Elliott, in the first volume of his work on Evidence (Edition 1904), at Section 261, says:

> "The admissions of one person may also be received against another, when they are privies in law, blood or estate. The general principle upon which they are received is that the parties, being in privity, are identified in interest, and the rule extends, in general, only so far as there is such an identity of interest. Where a party, by his admissions, has waived his own

> right, and another claims to succeed him as a privy, such as a grantee, an heir, executor, or the like, the latter generally succeeds to the right only as thus qualified at the time his title commences, and the admissions are receivable against such privy or representative, just as they would have been received against the person through whom he claims, or whom he represents.

To sustain the text, the author cites numerous cases from Alabama, Massachusetts, California, Wisconsin, Kansas, Indiana, Indian Territory, South Carolina, Virginia, North Carolina, Minnesota, Mississippi, Georgia, West Virginia, New Hampshire, Texas, Illinois, New Jersey, Vermont, and the case of Dodge v. Freedmen's Savings & Trust Company, 93 U. S. 379, heretofore referred to.

It should be borne in mind that on October 4, 1844, the date of the execution of this contract, Mr. Butler had in his possession an unrecorded deed from Bissell, bearing date February 22, 1843. (Tr. 37.) The registration law of Ohio is as follows:

> "All other deeds and instruments of writing for the conveyance or incumbrance of any lands, tenements or hereditaments, executed agreeably to the provisions of this chapter, shall be recorded in the office of the Recorder of the county in which the premises are situated, and until so recorded, or filed for record, the same shall be deemed fraudulent, so far as relates to a subsequent bona-fide purchaser, having at the time of purchase, no knowledge of said instru-

ment." (Section 4134, Bates' Annotated Ohio Statutes.)

In the first place, it would seem, from an examination of this contract, that it is not "a deed or instrument of writing for the conveyance or incumbrance of any lands, tenements or hereditaments," and therefore was not subject to registration.

The foreclosure sale occurred September 24, 1844, the confirmation of that sale occurring shortly thereafter and before the contract of October 4, 1844, was made. The Commissioner's deed to Henry Anderson was not executed until November 18, 1844.

> "Subject to the effect of the land registry laws, statements of a former owner of real estate are competent against the party who claims under him, by an interest acquired since the declaration was made." 16 Cyc. 986.

To the same effect are the cases of Henderson v. Wanamaker, 79 Federal 738, and Baker v. Humphrey, 101 U. S. 499.

The contract of April 4, 1844, was, we submit, not entitled to record under the law of Ohio. Section 4134 Bates, supra.

But inasmuch as the petitioner is now claiming that Mr. Butler at that time had an equity in the property involved herein, it was clearly competent to show by Butler's own admission that he did not. It was also competent to show that he did not claim title under his unrecorded quit claim deed from Bissell, especially in view of the fact that petitioner is now basing his claim of title in part upon that very deed.

We submit that neither Calvin Bronson, the immediate predecessor in title of the petitioner here, nor the petitioner, himself, can claim to have been innocent purchasers for value. The reasons for that insistence clearly appear from the situation as disclosed by the record at the time of Bronson's purchase.

The record shows that Anderson acquired, by the Master Commissioner's deed to him, what appeared to be the legal title conveyed to him as a result of the foreclosure proceedings, while Butler, according to the disclosures of the records, appeared then to have been concealing the fact that he had a quit claim deed from Bissell, which, if known, must have been regarded as a fraud upon the rights of Henry Anderson.

At the time of the sale by Butler to Bronson, it was thought necessary to obtain quit claim deeds from James H. Anderson and from the executors and trustees of the estate of Henry Anderson. These were executed to Mr. Butler, and in the deeds of the trustees and executors it was recited that Anderson had acquired the legal title, but although he held it in trust for Butler, he had made no declaration of trust in his lifetime.

In addition to these facts, the record shows that there was, about this time, and before the purchase by Bronson was concluded, placed upon the records of Lucas County, a number of tax deeds, arising out of sales which resulted from Butler's failure to pay taxes which, according to the contention now made by petitioner, he was obliged to do.

We respectfully submit that the effect of these conveyances, if they had been valid and sufficient to convey the title, would have been to defraud and deprive the devisees under the will of Henry Anderson of their rights.

The further fact is indisputable that the will of Henry Anderson was put of record before the sale to Bronson was consummated. Bronson was of course charged with the duty of properly interpreting this will. Had he construed the will as the Circuit Court of Appeals construed it, and as we here and now insist it should be construed, he should have known that the respondent here was the remainderman, whose rights he was bound under the law to respect, and he would have been further charged with knowledge that he was acquiring from Mr. Butler nothing save the life estate of James H. Anderson.

All of these facts which we have recited, we submit were more than sufficient to put him on inquiry. If so, his successor in title, who is his heir, cannot now claim that Bronson was an innocent purchaser for value.

We further submit that under the law, the quit claim deeds in the chain of title, all of which were executed at or about the time of the consummation of the sale from Butler to Bronson, were of themselves sufficient to prevent Bronson, or his heir, from claiming the position of a bona fide purchaser. See note under 29 L. R. A. 47.

A bona fide purchaser is defined in 5th Cyc. at page 719, to be:

> "One who, at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside, and purchases in the honest belief that his vendor had a right to sell, *without notice, actual or constructive, of any adverse rights, claims, interests or equities, of others in* and to the property sold." * * *

In any event, in view of the fact that petitioner seeks to establish by the declarations of the trustees and life tenants, that Henry Anderson held the property in controversy as mortgagee only, contrary to the purpose of the deed of the master commissioner to said Henry Anderson, it would seem that no valid reason could exist for rendering incompetent or inadmissible the declarations of Mr. Butler himself, to the contrary.

On page 92 of the brief for petitioner, under the sixth sub-heading, entitled: "Errors Concerning the Foreclosure Proceeding," the contract of October 4th, 1844, and title acquired by Henry Anderson by master's deed, a lengthy argument is made.

This contract was made after the sale of the land by the commissioner to Henry Anderson, but before the execution of the commissioner's deed to him. In the contract the rights of Henry Anderson under the decree of sale were expressly and carefully guarded and protected. The entire language of the

instrument conclusively negatives the idea that the trust should continue. It is inconceivable that if any contrary argument had been made, Mr. Butler would have omitted to put it in this contract.

Touching this contract, Judge Severens said (Tr. 74) as follows:

> "Coming then to the agreement of October 4, 1844, it is apparent that Butler knew that Anderson had bid off the property and he consented that the sale should go on to its consummation. It was not stated that the expected deed should be affected by a trust, and the insistence with which Anderson, by the stipulation of his contract, held onto the benefits of his purchase is indicative of his understanding in making the agreement, and it was indicative to Butler of Anderson's expectation. The latter relinquished the control of his other securities and gave Butler the power to discharge Bissell's liability upon his note. It seems singular that Anderson should have practically stripped himself of the control of everything else in the nature of a security to a slow debtor for so large a sum as $20,000 unless he were to gain some substantial advantage under his purchase at the master's sale. And it is noteworthy that in the deeds which Butler obtained from the sons of Henry Anderson after the latter's death and which deeds will hereafter be more particularly considered, they are moved to recite that Henry Anderson took the title to said lands as security for Butler's debt and that he died without 'having made or executed any declaration in writing of the purpose for which said property was held;' which seems to indicate that such a

> declaration was due and expected, and the inquiry is pertinent, why if there was such an understanding nothing was said about it in the agreement of October 4, 1844? Butler seems to have been very watchful for his own interests, and it seems unlikely that so importannt a matter should have then been overlooked and not taken care of until several years after Anderson's death and only developed while the trustees were settling his estate."

It is argued that Butler was to receive nothing for the property, because his personal liability to Anderson on the original note was to continue. As a matter of course, Butler was entitled to receive credit on his indebtedness for the amount of the purchase price of the property, and his personal liability on the note would be pro tanto extinguished.

But it is said that Butler received no credit for the $6,921.00 which the property brought at the master's sale, and this contention is predicated entirely upon the persistent assertion by petitioner's counsel that the debt was over-paid. The question of fact involved in this instance is one which will be discussed in a later part of this brief.

We cannot, however, permit to go unchallenged the following statement, appearing on page 98 of brief for petitioner:

> "We respectfully submit that the Circuit Court of Appeals in its first decision committed a mathematical and legal error with respect to the payment of this debt. In its later decisions

it declared itself without power to relieve itself or the parties from the effects of this manifest error, a matter which we shall discuss later."

This statement is an injustice to the Circuit Court of Appeals, for which we have been unable to find any excuse. The Circuit Court of Appeals made no such declaration as is attributed to it, and each of the opinions rendered will be searched in vain for anything even suggesting such a statement. We believe that we will hereafter demonstrate to the Court that no eror whatever was made, either mathematical or legal, with respect to the payment of this debt.

"Charles Butler Paid His Debt in Full."

Beginning on page 103 of the brief for petitioner, and continuing for 11 pages, a most extended, but very misleading argument is made to sustain the astonishing statement which constitutes this subheading.

We assert, without the slightest fear of successful contradiction, that, if the record is carefully examined, the following statement of Circuit Judge Severens, upon the first writ of error, will be found to be literally true:

> "The money which he (Butler) paid to them, as Trustees, upon his note was not much, if any, more than was sufficient to pay it, after crediting him with the proceeds of the Master's sale."

We deny that the Circuit Court of Appeals was led into any mathematical error whatever with respect to the payments made by Butler, and deny that that Court, through inadvertence, assumed anything.

The Court will readily grasp, from the record in this case, that Charles Butler was the character of man, who, to say the least of it, was exceedingly watchful of his own interests. So impressed were the Judges of the Circuit Court of Appeals with the character of Mr. Butler, as evidenced by the record before it, that Judge Severens said of him (Tr. 88), as follows:

> "But we are unable to discover any grounds upon which it could be claimed that any equity

was created for Butler by his transactions with the Trustees. It is unnecessary to say that he was conscious of wrong doing, for he may have conceived that the legal effect of the foreclosure proceedings left Henry Anderson in the position of a trustee for him, in respect to the lands; but his course was taken entirely in his own interest and was prejudicial to the estate. The trustees were induced by his representations to treat the master's deed to Henry Anderson as a mortgage, when in fact it was not. The sons were induced by appeals to filial sentiment to make admissions, the truth of which was taken on trust, and these admissions were adopted by the trustees, as the basis of their dealings with Butler. * * * We desire to make no further comments upon the character of these transactions than the adjudication of the rights of these parties requires, but we cannot realize any basis on which to build up anything more than the strictly legal rights which Butler acquired therefrom."

It is difficult to conceive of a court of the standing of the Circuit Court of Appeals for the Sixth Circuit, as constituted at the time of the rendition of this opinion (July 15th, 1906), making a perpetual record of the character indicated of any man, living or dead, unless the transcript before them fully and thoroughly justified the imputation. In fact, the expressions of Judge Severens, as above quoted, were, in our judgment, mild and full of charity. At all events, this Court cannot fail, upon a careful examination of this record, to realize that Charles Butler was actuated in all of his dealings

by the principle that self-preservation is the first law of nature.

It is practically inconceivable that Mr. [illegible] would have made repeated mistakes to his own detriment. It is not our province to inquire into what his course of action would have been when he might be advantaged thereby, but in our judgment, it is indisputable that Mr. Butler would have made no mistake against himself in calculating the amount of his indebtedness.

On March 2, 1860, Mr. Butler wrote a letter to Mr. Goodman, wherein he enclosed a copy of the account as settled by him with Walter Goodman and Peter Anderson, Executors, on October 1st, 1854. In that letter, he states as follows: "*Since then, the only payment made was of four thousand dollars* to Peter Anderson, on 1 January, 1857, of which you have also a statement, as you recollect." * * * "In the fall of 1855, when we had the final settlement here, I agreed to pay seven per cent after that date, and I have so computed the amount, *making $9,183.88 due on 1 January last.*" (Tr. 397.)

Even if there had been a possibility of mistake by Mr. Butler against himself in this letter of March 2nd, 1860, he writes another letter on May 7th, 1860, regarding his indebtedness. This letter states the balance due by him on May 1st, 1860, to be $9,360.97. This letter appears at page 398 of the transcript, and we quote therefrom as follows:

> "I am happy to say that the sale to Mr. Bronson of the Toledo property was concluded, and

> enclosed I hand you certificate of deposit for $2,041.00, the amount of cash payment to apply on my debt *(the balance of $9,360.97 due on 1 May, instant)* to your father's estate."

Absolutely the only evidence in the record of any subsequent payments consists of the certificate of deposit of $2,041.00, enclosed in the above letter (Tr. 398), a check for five hundred dollars enclosed in the letter of August 9th, 1860, and $2,419.49, which may inferentially be held to have been gotten and used by James H. Anderson. And in the letter of February 1st, 1861, (Tr. 399), in which he advises James K. Anderson of a deposit to his credit of $2,419.49, Mr. Butler states as follows:

> "This payment, as I compute the interest, will leave due to you on the 28th of January, $5,100.00."

Absolutely the only scintilla of evidence in the record, from which it could be argued, even though the argument be an impossible one, that any further payments were made by Mr. Butler, is the introduction by the defendant below of a draft, shown at page 571 of the transcript, and appearing to have been drawn by James H. Anderson on Butler on March 8th, 1861, for $2,172.70. There is not a suggestion in the record that this draft was intended to go as a credit upon the amount due the estate of Henry Anderson by Butler. Passing the question that each of the payments of May 7th, 1860, August 9th, 1860, and February 1st, 1861, was made to James H. Anderson, the life tenant, and that the draft mentioned was drawn by him, the fact is that

no sort of evidence suggests that Mr. Anderson applied, or was under any obligations to apply the proceeds of this draft upon the debt of Butler to the estate of Henry Anderson. The record shows conclusively that there were many transactions, during the lifetime of both Anderson and Butler, a large part of them growing out of the general agency which they held for the American Land Company. It is just as fair to assume that this draft of $2,172, which is accompanied by no explanation whatever, nor by any sort of suggestion that it was intended as a payment on the note originally for twenty thousand dollars, was in settlement or part payment of some other account, or some other indebtedness.

We believe that counsel's insistence that the debt was paid, is brought about entirely by a misapprehension as to the payment of the note for $7,340.00, shown on page 528 of the transcript, and dated October 1st, 1853. We believe that note to have been paid to the executors in two items, one of April 20th, 1855, shown in the 9th report of the executors (Tr. 528), amounting to three thousand dollars, and the other by an item in the tenth report of the executors, dated October 30th, 1855, (Tr. 528), for $4,340.00. In other words, we believe that the counsel for petitioner have twice given Butler credit for $7,340.00.

Counsel themselves say, on page 108 of their brief, as follows:

> "It may be that the note for $7,340 was not paid for some time after it was given."

and then they proceed to speculate upon how it was

paid, and in their speculations they show payments amounting to $11,133.19. That their guess cannot be correct is shown by the fact that the note was for only $7,340, but they submit payments aggregating nearly $4,000 more than the note. On the very next page they undertake to administer a totally different method of payment of this $7,340 note, and by this attempt at administration, they show an overpayment of $738.87.

In any aspect of the case, the best evidence as to the condition of the indebtedness of Butler to Anderson lies in the statements of Mr. Butler himself. It is to our minds unthinkable that Mr. Butler would have several times, at intervals of several months each time, made serious mistakes against himself.

Upon this branch of the case we submit with all confidence that the Circuit Court of Appeals was correct in the first finding upon these facts.

It is not claimed that the record, upon the subsequent hearing, contained any different evidence, with respect to these payments, than was adduced on the first trial. In fact, counsel for petitioners say at page 104 of their brief:

> "*The same proof with respect to payments* made by Butler was placed in evidence and relied upon by petitioner in each trial of this case in the Circuit Court."

If this statement of counsel for petitioner be true, (and it undoubtedly is), the Circuit Court committed no error in refusing to submit the question of payment to the jury upon the third trial. The law of

the case had been settled by the Circuit Court of Appeals, and the Circuit Court had no alternative but to follow the law of the case as settled by the Court of Appeals.

It is said, on page 113 of the brief for petitioner, that:

> "It will no doubt be claimed by counsel for respondent that the evidence concerning payments made by Mr. Butler is in dispute."

It is not so claimed by counsel for respondent, but, on the other hand, it is contended that there was absolutely no dispute about the evidence, and that it all showed conclusively that the debt had not been paid, and never has.

Contention as to Duty of Trustees to Execute and Deliver Deed to Butler.

The argument made under this heading is predicated largely upon the assumption that Butler paid his indebtedness.

We have hereinbefore argued this point, and deem further discussion of it useless, except to repeat, that the debt was never paid, and has not been to this good day.

Touching the argument that the trustees determined that Anderson acquired and held the Toledo property in trust, we think it pertinent to quote the following from Judge Severens' opinion:

> "The trustees were induced by his (Butler's) representations to treat the Master's deed to Henry Anderson as a mortgage, when, in fact, it was not. The sons were induced by appeals to filial sentiment to make admissions, the truth of which was taken on trust, and these admissions were adopted by the trustees as the basis of their dealings with Butler."

We believe it would be utterly impossible for any unprejudiced and unbiased person to read this record carefully, and reach any other conclusion than that Judge Severens was correct in his statement, just quoted.

The tenor of the contract of October 4, 1844, made at a time when Anderson had purchased the property, and the sale to him had been confirmed, and these facts known to Butler, shows conclusively, as we submit, that it was the intention of both Ander-

son and Butler for Anderson to take and retain the legal title to the property purchased by him, unburdened by any trust of any character whatever. In fact, the contract itself refers to this foreclosure proceeding as having been "*taken in the name and behalf of the said Henry Anderson.*" It is agreed that Anderson died in April, 1846, nearly a year and a half after he had acquired title to this property through the Master's sale. It is perfectly certain that during this period of nearly eighteen months, Mr. Anderson executed no declaration of trust whatever. It is equally certain, and of more than passing significance, that this record shows no claim by Butler of the existence of such a trust until February of 1849, when he induced William Anderson to sign a declaration of the supposed trust. Again, in 1851, he repeated this performance with James H. Anderson. In both of these declarations, Butler agreed and promised, as the consideration moving the other parties to execute them, that he would pay the indebtedness due the estate in certain installments (none of which, or few, if any, payments were made).

The declarations by the life tenants, who were evidently treated by the executors as the real owners, under a misinterpretation of the will, constitute the basis for the conclusion of the executors and trustees to execute the deed.

Mr. Butler's misrepresentations as to the existence of the trust were clearly a part of the scheme evolved after the death of Henry Anderson. That he was capable of devising a plan to defraud is clearly evidenced by the fact that on February 22, 1843, he

procured Bissell, the common source of title, to execute to him a quit claim to the property involved. This deed was taken by Butler, at a time when Henry Anderson held Bissell's mortgage, executed to Butler as security for the note which Butler owed Anderson. This deed was not filed for record until October 11, 1849, a period of more than six years after Butler had taken it. He concealed this quit claim from Anderson and the world, but after Anderson was dead, and no living person could, of his own knowledge, disprove his assertions about this alleged trust, he put it on record in furtherance of his plan to manufacture a trust, which never in fact existed.

Under these circumstances and when the executors were without means of ascertaining the real truth from the lips of the dead man, Henry Anderson, it is small wonder that the shrewd and crafty Butler, to whose intelligence an involuntary tribute must be paid by any one who reads his letters, imposed upon the sons of Henry Anderson and also upon the executors.

In this situation, and in view of the obvious concealments and misrepresentations which characterized the course of double dealing upon the part of Mr. Butler with the executors and the life tenants, it was well for the unborn remainderman that it was beyond the power of the tenants for life, who were thus imposed upon by Butler, to defeat or prejudice his rights by their own acts or admissions, induced by those misrepresentations. As said by Judge Severens, in his opinion (Tr. 89):

> "The only way in which the remainder could have been destroyed would have been the valid exercise of the power given to the trustees by the will."

The following statement appears on page 114 of the brief for petitioner:

> "With full opportunity for learnings the facts the trustees, in the exercise of their best judgment, within the life of the trust, determined that no such credit was to be allowed, because Henry Anderson had acquired and held the Toledo property in trust, as security for the debt evidenced by this note."

It is perfectly clear from this record, that the trustees misinterpreted the will of Henry Anderson, and conceived the idea that by its terms the fee simple estate, or certainly something more than a life estate, was vested in William and James H. Anderson. They were doubtless aware of the fact that Butler had obtained from both William and James H. Anderson (from William on October 10th, 1849, and from James H. on September 16th, 1851) declarations of trust, which were induced by the misrepresentations of Mr. Butler (who was the only living man knowing the real truth about it, and who evidently deceived these young men, just turning twenty-one years of age). Applying the ordinary rules of common sense and business prudence, and placing ourselves as nearly as may be in the position then occupied by the executors, it is the most natural thing conceivable to realize that they, believing James H. and William Anderson to be the only ones

interested in the property, were content to accept the written statement of William and James H. and felt that their duty as executors required them to go no further.

No evidence whatever in this record suggests that any investigation of any character was made by these executors, and it may well have been that they, entertaining the views which they must have done, concerning the proper construction of the will, deemed any further investigation than an inspection of the two declarations of trust, which William and James H. Anderson had executed, wholly superfluous and unnecessary.

The Deed From Edward Bissell of February 22d, 1843.

Under the twelfth subdivision of the brief for petitioner, it is argued at length that the deed from Edward Bissell, dated February 22d, 1843, and appearing at page 37 of the transcript conveyed to Charles Butler title to the property involved herein.

It will be borne in mind, when considering this contention on behalf of the petitioner, that prior to the date of this Bissell deed, and on September 23d, 1841, Butler had assigned to Henry Anderson the mortgage which he had therefore obtained from Edward Bissell, the original owner of the property (and the common source of title in this litigation), to secure an indebtedness which Butler owed to Henry Anderson of about twenty thousand dollars. Occupying, as Butler then did, the relation of mortgagor to his mortgagee (Henry Anderson) it is inconceivable that Mr. Butler could have secretly acquired an outstanding title which the Court would permit him to assert as against Henry Anderson. At this time Anderson's rights were no higher than those of a mortgagee, because the foreclosure proceedings subsequently instituted and completed in the Common Pleas Court of Lucas County, Ohio, were not begun until September 19th, 1843. (Tr. 15.) Manifestly, then, under these circumstances, Butler could not have acquired a title hostile to Anderson.

This deed from Bissell, it is stipulated, was not put on record until October 11, 1849, more than six years after it was dated, and more than three years

after the death of Henry Anderson. There is no suggestion in the record that Henry Anderson ever knew or had any intimation of the existence of this deed. On the contrary, at the time of the contract of October 4, 1844, it is manifest that Anderson believed that he was getting a good title to the property which he had purchased at the Master Commissioner's sale. This is perfectly evident from the contract of October 4, 1844 (Tr. 35-36), wherein the institution of the proceedings of foreclosure were referred to, in the document signed by both Anderson and Butler, as having been "*taken in the name and behalf of the said Henry Anderson.*" To our minds, it is utterly inconceivable, in the light of this language used by these parties, that Henry Anderson could have intended anything other than to acquire the legal title to said property or that Butler had any other intention or understanding. If he acquired no legal title to the property by these proceedings, and never intended to do so, then they were not *instituted in his behalf*, but those proceedings constituted merely an idle form, from which Henry Anderson derived no benuefit whatever, but, on the contrary, was left by the contract of October 4, 1844, and the surrender of the securities therein agreed to be surrendered, stripped of every collateral for the payment of his debt. It would tax the credulity of the human mind beyond endurance to believe that the parties ever contemplated any such result. On the contrary, the plain and simple meaning of the language used conclusively shows that Anderson was to surrender the stock in the Erie &

Kalamazoo Railroad Company, was to credit Butler with the proceeds of the purchase price of the property (which was more than two-thirds of its appraised value) acquired by Anderson, and hold Butler for the unsatisfied portion of the debt.

As we understand the argument made under this sub-heading, it is predicated entirely upon the assumption that Anderson was not a bona-fide purchaser of the property. This theory is based upon the insistence that Anderson paid nothing for the property.

It is true that the record fails to show that Anderson's check for $6,921 was given to the Master who conducted the sale, and that the Master's check was in turn given to Anderson, as a credit upon the note which Anderson held against Butler, but, as said by Judge Severens (Tr. 73):

> "If, in the present case, the property had been sold to another party, there could be no doubt that the sale and deed would have carried to the purchaser the title which the mortgagee, Bissell, had when he made the mortgage, and would have transferred any interest which Butler had in the property to the proceeds of the sale. The trust would attach to them. And to the extent of the sum due on Butler's debt, there would be a satisfaction of it. If there were a surplus, it would belong to Butler. Nor could it make any difference that Anderson bid off the property. The result would be the same. *If he paid the Master the amount of his bid, it would be paid back to him on its being brought into Court, a formality generally dispensed with*

by the Master's taking the receipt of the creditor for so much of the proceeds as the decree adjudges to be due to him, and bringing the balance into Court to be paid over to the party entitled. If, as here, the party who might be so entitled, was beyond the process of the Court, he could come in by petition, and on showing his right, obtain it. Butler, the assignor, was not served with process. He was a proper but not an indispensable party, and he was not within the jurisdiction of the Court. The object in making him a party would be to enable him to make any objections which his interest might require, and to preclude him from thereafter raising any. But his agreement shows that the debt remained unpaid, and that, knowing the proceedings were pending, and without suggesting any objection to them, he stipulated for their completion. The reasons on which a party in interest is allowed to purchase at a judicial sale, whereby he must become answerable for his bid, are inconsistent with the notion that the proceedings have resulted in nothing more than a continuance of the trust for the same whole debt."

It is true, as argued by counsel for petitioner, that the executors, in their subsequent dealings with Butler, charged him with the full face of the $20,000 note, and interest from its date, and made no deduction or credit for the property involved herein. But we emphatically deny that this was an admission of the payment of no consideration for the Master's deed, and we assert that, even could it be construed as such an admission, it would not be binding upon the remainderman. This supposed admission of

the trustees was made evidently upon the basis of the misrepresentations of Butler, and should be accorded no weight whatever, in the light of Mr. Butler's own statements, contained in his letters heretofore referred to, to the effect that he had not paid the debt.

The natural and only logical result would be that Mr. Butler was entitled to credit on his debt to the extent of $6,921, paid by Anderson for the property. If the $7,340 note, heretofore discussed, has been twice credited among the payments on the Butler debt, as we have argued in an earlier portion of this brief, this of itself would largely more than counterbalance the $6,921 now referred to.

The ultimate contention on behalf of petitioner, as made under this sub-heading, is that the statute of limitations of Ohio of twenty-one years began to run from the date of this Bissell deed.

It is axiomatic, in the law of limitation of actions, that the statute does not begin to run against a mortgagee and in favor of a mortgagor, unless the possession be adverse. There is absolutely nothing in the record to suggest that the possession of Butler was adverse or hostile to Henry Anderson, or that Anderson had any reason for suspecting Butler's secret and well guarded intent (if any such he had) that his possession was in any sense antagonistic to Anderson.

Error in Reversing Second Judgment.

The very brief argument under this subheading requires no further reply than a reference to the exhaustive opinion of Judge Severens, appearing at page 254 of the transcript in this case, and reported in 158 Federal, at page 250.

Denial of Full Faith and Credit to State Court Judgments.

The argument made under this subdivision of the brief, which is No. XIV, goes to the effect of the State Court litigation in its various forms and angles.

The question of whether or not the Circuit Court and the Circuit Court of Appeals erred in declining to follow the Supreme Court of Ohio in Anderson v.

United Realty Company, and the Court of Common Pleas and the Circuit Court of Lucas County, Ohio, in their decisions in the United States Mortgage and Trust Company litigation, are treated elaborately, forcibly, and, as we submit, unanswerably, by Mr. Justice (then Circuit Judge) Lurton, in his opinion on the last writ of error. This opinion appears at pages 612 to 625 of the transcript in this case, and is also reported in 171 Federal at page 785.

Counsel for petitioner quote a portion of the opinion just referred to, but they do not quote sufficient of it to show the real basis of the holding in that case. Because of this omission of counsel, we here and now quote so much of the opinion as we think pertinent.

> "In the case before us it appears that after the judgment below the Supreme Court of Ohio affirmed the judgment whose finality is questioned, and that this fact was brought to the attention of the Court below upon an application for a new trial. Under such circumstances we shall, for the purpose of this case, assume that this judgment was competent evidence in support of the plea of res adjudicata.
>
> The title of the plaintiff in both actions depended absolutely upon the will of his ancestor, Henry Anderson. Interpreted as he contended, his title was clear and indisputable; construed as the defendant in both actions insisted, he took nothing under that will, and his actions must inevitably fail.
>
> That a final interpretation of that will in one suit would control in any subsequent litigation between the same parties or privies, in which the

same question, under the same conditions, should arise, if presented seasonably, as a former adjudication, is not disputable. That different parcels of land were involved in the two cases would not be material; for if the parties were the same, and the subsequent case should turn upon the same question decided in the former case, under like conditions, that question could not be relitigated if relied upon as an estoppel. Bank v. Beverly, 1 Howard 134, 149; New Orleans v. Citizens' Bank, 167 U. S. 371, 396; S. P. Rd. Co. v. United States, 168 U. S. 1, 48; Union Bank v. City of Memphis, 111 Federal 561.

Thus in New Orleans v. Citizens' Bank, supra, Mr. Justice White, for the Court, said:

'The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies.'

The rule of estoppel relied upon is, therefore well settled. The trouble in this case grows out of the fact that there is an apparent conflict of prior adjudications, each of which was pressed upon the court below as governing the judgment upon the third trial of this case in that court. The one was the judgment of the Ohio State Court in the case of Anderson v. United Realty Company and Messinger, and the other was the judgment and opinion of this court interpreting and construing the will of Henry An-

derson under the first writ of error to this Court.

The Ohio court held that under the will of Henry Anderson the plaintiff took no interest whatsoever, and this view has since the trial below been affirmed by the Supreme Court of Ohio. See 54 Ohio Law Bulletin, p —.

This court, in this very case, upon the first writ of error, and before any decision by the Supreme Court of Ohio, decided that the plaintiff took under that will an estate in remainder in all of the property in controversy (146 Federal 929). Which view of the will involved was the Court below required to accept as the law of the case?

That every question of law or fact which was before this Court upon the first writ of error and decided by its opinion, was thereby conclusively settled, both for the court below and for this court upon subsequent writs of error, is not open to serious debate. That matters not decided upon the first writ are open for consideration in the lower court upon a second trial is, of course, true, and many times a new case may be made upon new questions of law or fact, where the mandate does not direct a particular judgment. But so far as questions of fact or law are specifically decided, and the cause remanded for further proceedings, the court below is not at liberty to re-examine any such decided matters, but must proceed in conformity to the mandate as interpreted by the opinion of this court. No other rule is conceivable having regard to the necessity of putting an end to litigation. The cases upon this point are numerous. Among them are: Bissell & Co. v. Goshen Co., 72 Fed-

eral 545; Western Union Telegraph Co. v. City of Toledo, 121 Federal 734; Stoll v. Loving, 120 Federal 806; all decided by this court; and, Sibbald v. United States, 12 Peters 488, 492; in re Sanford Tool Company, 160 U. S. 247, 259; Roberts v. Cooper, 20 Howard 467, 481; Skillern v. May, 6 Cranch 266.

In Skillern v. May it was discovered after the case had been reversed and remanded for further proceedings that the cause was one not within the jurisdiction of the circuit. But upon a certificate of division of opinion upon the right of the Circuit Court to dismiss the suit for this reason, the Supreme Court answered that after the merits of the case had been decided, it was too late for the Circuit Court to do anything other than carry into execution that decree.

The finality of the decision of this court, so far as it did decide any question, is not affected by the fact that it was a judgment reversing the lower court and directing a new trial. The authorities are numerous. We cite a few only: Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 553; Western Union Tel. Co. v. City of Toledo, 121 Federal 734; Stoll v. Loving, 120 Federal 806, 808; Tyler v. Magwire, 17 Wallace 254, 282, 283; Young v. Frost, 1 Md. 394; Haley v. Kilpatrick, 104 Federal 647; Orient Ins. Co. v. Leonard, 120 Federal 808; Mathews v. Columbia Bank, 100 Federal 393; Theological Seminary v. the People, 189 Illinois 439, 452; Leese v. Clark, 20 Cal. 39, 44."

It would be difficult to add much, if anything, that would further illumine this subject.

We think it proper, however, to call attention to the case of Wilcox v. Consolidated Gas Company, 212 U. S. 19, which is cited by counsel for petitioner. Mr. Justice Peckham said in that case that:

> "A plaintiff could not be forbidden to try facts upon which his right to relief is based before a court of his own choice, if otherwise competent."

Applying that statement of the law to the instant case, and bearing it in mind as the investigation proceeds, we feel sure that an examination of this record will sustain our contention that the United States Mortgage & Trust Company litigation, and the adjudications therein by the lower courts, if given the force and effect contended for by petitioner would result in a denial to the respondent of the very right there announced to belong to him. The respondent, who was the plaintiff below, selected the United States Circuit Court at Toledo, and such superior courts of that jurisdiction as might subsequently review the litigation, as the forum of his choice to try his right to the relief that he sought. This Mr. Justice Peckham states he had a perfect right to do. The United States Mortgage & Trust Company held mortgages of questionable validity (on account of Mr. Messinger's lack of title), and after the lower State court had decided Anderson v. United Realty Company adversely to Mr. Anderson, and the United States Circuit Court of Appeals had decided Anderson v. Messinger adversely to Mr. Messinger, instituted their actions of foreclosure in the State court. To this litigation the Trust Com-

pany made both Anderson and Messinger parties. Messinger's counsel, quick to grasp the situation, filed his answer and cross petition, making no resistance whatever to the foreclosure of the mortgages, but seeking to re-litigate in the State courts the very questions which had been decided adversely to him in the Circuit Court of Appeals.

To give the effect contended for to such litigation, instituted under those circumstances, and with the lights that were then before all of the parties, would, we submit, be the equivalent of forbidding the plaintiff below (the respondent here) from trying "the facts upon which his right to relief is based before a court of his own choice."

As said by Mr. Justice (then Circuit Judge) Lurton:

> "The finality of the decision of this Court, so far as it did decide any question, is not affected by the fact that it was a judgment reversing the lower court, and directing a new trial."

Supporting this enunciation of the law, the learned justice cites various cases from this and other courts, an examination of which will fully sustain the statement.

Counsel for petitioner complain that full faith and credit was not given to the judgments of the State courts. Respondent might, with equal or even greater show of reason, contend that the State courts denied full faith and credit to the judgments of the Federal courts, because if it be true, as stated by

Mr. Justice (then Circuit Judge) Lurton, that the finality of the decision of the Circuit Court of Appeals on the first writ of error was not affected by the fact that it was a judgment reversing the lower court, and directing a new trial, then the proper construction of the will and the determination of every question involved (save and except as to the tax titles) was res adjudicata.

Insofar as concerns the judgment of the court of Common Pleas of Lucas County, rendered in the case of Anderson v. United Realty Company, it is sufficient to refer to the opinion of Mr. Justice (then Circuit Judge) Lurton, and to that portion of it appearing on page 613 of the transcript in this case, where he demonstrates conclusively that totally different property was involved in Anderson v. United Realty Company from that which was involved in the case at bar.

We deem it unnecessary to add more to what was so well said by Mr. Justice (then Circuit Judge) Lurton in the opinion last referred to.

"The Deed of the Trustees Conveyed the Legal Title."

It might be admitted that the consideration named in the deed of the trustees was sufficient to pass the title, but that admission, if made, would not cure the fatal defect of the lack of power in the trustees to convey any title whatever. In our view of the matter, the consideration passing to the trustees (or, rather, the lack of it) was merely a circumstance going to show that the trustees were in fact moved by no real consideration, except the recital in that deed (evidently based upon the misrepresentations of Butler) that it was understood that a trust was impressed on the property when it was conveyed to Henry Anderson, and remained thereon. The fact is that the deed of the trustees was not recorded until the 2d of May, 1860 (Tr. 17), whereas the trust expired June 25, 1856, nearly four years previously. As said by Judge Severens:

> "It follows that the deeds to Butler (of the executors) so far as they are regarded as deeds of the trustees, conveyed no title, for the trust had been extinguished several years before. No judicial act was required to terminate the trust, as would be necessary in the case of an executor. * * * The executors might, under certain circumstances, sell and convey the lands of the testator, as, for instance, to pay debts. But this would require an order of the probate court upon notice to the parties interested."

"Disregard of Ohio Statute and Presumptive Evidence Defeated Petitioner's Right of Trial by Jury."

Under this heading, it is argued that the certified copy of the deed from the executors and trustees to Butler was competent evidence in favor of petitioner, and was prima-facie evidence of its delivery to Charles Butler at its date, October 9, 1855, and that that deed, and all of the other evidence relating thereto, should have been submitted to the jury.

On the first trial of this case, the defendant there (the petitioner here) offered this very deed in evidence. (Tr. 11-12.) Upon the evidence on that trial, as embodied in the record taken to the Circuit Court on the first writ of error, that Court found that the law and the facts regarding the question raised, and here and now again urged. This finding was, as stated by Judge Severens, in his opinion on the second writ of error, a question that was precluded by the decision on the first writ of error. Again, it was said by Mr. Justice (then Circuit Judge) Lurton, in his opinion on the third writ, as follows:

> "That every question of law or fact which was before this Court upon the first writ of error, and decided by its opinion, was thereby conclusively settled for the court below, and for this Court, upon subsequent writs of error, is not open to serious debate. * * * But so far as questions of fact or law are specifically decided, and the cause remanded for further

> proceedings, the court below is not at liberty to re-examine any such decided matters, and must proceed in conformity to the mandate, as interpreted by the opinion of this Court. No other rule is conceivable, having regard to the necessity of putting an end to litigation. The cases upon this point are numerous. Among them are:"

and here the learned justice cites various cases in Federal Reporter, and four cases decided by this Court, the last being In Re Sanford Tool Company, 160 U. S. 247.

If this be the law, then the Circuit Court committed no error whatever in refusing to submit to the jury the question discussed under this sub-heading of petitioner's brief, but, on the contrary, the Court obeyed the mandate of the Circuit Court of Appeals, which it was its bounden duty to do. It is not pertinent that there was any new evidence upon the subject adduced on the third trial. The question of the date of the delivery of the deed was presented under exactly the same proof as was adduced on the first trial. This statement is confirmed by that portion of the opinion of Judge Severens which appears on page 255 of the transcript before this Court.

We do not understand the argument under this sub-heading of the brief to contain any insistence whatever that the fact was otherwise than as the Circuit Court of Appeals found. We understand this argument only to go to the extent of attempt-

ing to demonstrate that the supposed question should be submitted to the jury. That, as a matter of fact, the deed was not delivered until 1860, we do not understand to be controverted by petitioner's counsel. Nor could it be controverted, in the face of the letters of Mr. Butler, appearing at pages 550, 551, 560 of the transcript, in each of which he refers to the fact that the deed, claimed by him to be an escrow in the hands of Mr. Halstead, of the Manhattan Bank, could only be delivered by Mr. Halstead upon the order of one or more of the executors.

In one of them (Tr. 560) he says the envelope containing the deed has marked on it these words: "*The property of Walter Goodman, Peter Anderson, and to be delivered on the order of either of them.*" In Mr. Devlin's very elaborate and valuable treatise upon the law of Real Property and Deeds, published October 1, 1911, he states the law to be as follows:

> "As we have before pointed out, *it is essential* to a complete and effectual delivery of an instrument intended to operate as a present deed, that *the grantor should part with all control and dominion over it.* If he retains the right to recall the deed, it cannot be considered as delivered. The same principle applies to an escrow. *If the grantor retains the right of control over it, it is not an escrow, notwithstanding the fact that it may be deposited with a third person, with instructions to deliver it to the grantee, upon the compliance by him of certain specified conditions.* An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is that there must be a parting with the possession, and of the power

DARK PAGE BLEED

and control over the deed by the grantor, for the benefit of the grantee, at the time of delivery." Sec. 324, p. 578, vol. 1.

As sustaining the text, the author cites Campbell v. Thomas, 42 Wisconsin 437; Miller v. Sears, 91 California 282; Prutsman v. Baker, 30 Wisconsin 644; in re Cornelius' Estate, 151 California 550, and various other cases too numerous to mention, from New York, Washington, Oregon, Georgia and Minnesota.

To the same effect is Shirley v. Heirs, 14 Ohio 310; Provart v. Harris (Ill.), 39 N. E. 958.

Authorities might be multiplied ad infinitum, but we believe the proposition to be too well settled to necessitate any further citation.

Reference to page 17 of the transcript will show that it was originally stipulated between counsel for all parties that the executors' deed, dated October 1st, 1855, was not actually delivered until about May 1st, 1860.

On page 97 appears a motion on behalf of the defendant Messinger for leave to withdraw the stipulation just referred to. This motion was made after the case had been reversed on the first writ of error from the Circuit Court of Appeals. Its grounds were stated to be, first, that the clause was untrue, was made under a mistake and misapprehension of the facts, and does great injustice to the defendant; and second, that it was made on the mistaken supposition and belief that competent evidence existed showing delivery in 1855, either absolutely or in escrow, but that afterward it was ascertained that there was no

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evidence to that effect. Counsel for the respondent here, on the second writ of error, urged the action of the Circuit Court in releasing the defendant from the stipulation, as error. The Circuit Court of Appeals, on the second writ of error, did not pass upon this assignment, perhaps because it was unnecessary, that Court stating that the fact of delivery in 1860 was abundantly proven otherwise. The respondent has not brought this case to this Court, and having been successful in the Court of Appeals has, as a matter of course, assigned no errors. However, such a considerable portion of the brief for petitioner having been devoted to the date of delivery of the deed of the trustees, we thought it entirely proper to acquaint this Court with the facts, as shown by the record.

The defendant below should never have been released from that stipulation. That stipulation bears unmistakable evidence of having been entered into deliberately and advisedly. It shows upon its face that it was drawn with the utmost care and precision of detail. It could not, therefore, be properly regarded as an ill-advised and hurriedly prepared document, improvidently or hastily entered into. The mere fact that the defendant below asked relief from only one of its sections, and the plaintiff from none, is ample proof of the correctness of the statement just made.

In order to induce the Court to relieve either of the parties from any portion of that stipulation, the applicant for relief should have shown, first, that his application was made seasonably; and second,

that the agreed fact, from which he sought relief, was otherwise than as agreed. The record before this Court shows neither of these things to have been done. The stipulation was entered into on June 1st, 1905 (Tr. 20), and yet no relief asked from any portion of it until October 31st, 1906. (Tr. 102.) In the meanwhile, the case has been tried in two courts, and seventeen months had elapsed without complaint, and when the complaint was made, the sole evidence offered in support of it is to the effect that counsel thought or believed that they would find some evidence which would show that what was agreed to was not true, and that they failed to find it. The plaintiff below, however, found ample evidence showing that his adversary had agreed to the real truth. This evidence has been heretofore referred to, and we shall not again refer to it at this time.

There was no pretense or suggestion that any fraud or imposition was practiced by the plaintiff below, and in the absence of these elements or of a clear mistake of fact in the thing agred to, the petitioner should not have been relieved from that stipulation.

If our position in this regard be well taken, it necessarily follows that there was not even a disputed question of fact as to the date of delivery, and we respectfully submit that this Court should treat as having been done that which the lower court should have done, and should foreclose the question against the petitioner and adjudge it a fact not open to debate.

Tax Titles.

The very lengthy argument under the sixteenth subdivision of brief for petitioner seeks to establish the constitutionality of the acts under which the tax titles referred to in petitioner's brief were supposed to have been made. While we believe these acts to have been in violation of the constitution and void, yet in view of the elaborate opinion of Judge Severens on the second writ of error in this case, which opinion appears on pages 254 to 262 of the transcript, we would regard it as a useless burden upon this Court, and an unnecessary consumption of its time to discuss this question.

In addition to this view which we hold, there is another reason why the tax deeds were of no moment in the consideration and decision of this case. Each of those tax deeds was based upon a delinquency in the payment of the taxes for the year 1847, although the proceedings relative to the assessment upon which said taxes were based had taken place as early as 1843. The deeds themselves were not made until 1860. After holding the statute under which these tax deeds were made unconstitutional and void, Judge Severens said of them as follows:

> "But there is another reason springing from other facts which we think must lead to the same result. In 1843, when this assessment, if valid, should have been paid, Charles Butler was the owner of this land by virtue of the deed to him from Bissell in February of that year. He continued to be the owner until the date of

the master's deed to Henry Anderson on November 18, 1844, and should have attended to the payment of the taxes and assessments levied upon the land in those years. The lands were bid off by Charles M. Dorr at the sale on December 27, 1847. On February 18, 1860, Butler sold these lands by contract to Bronson. March 26, 1860, Butler obtained from the city clerk deeds which recite that they were issued to Butler as assignee of the certificates of sale. He thus became the owner of a title which had its origin in his own default. By his contract with Henry Anderson of October 4, 1844, the latter was to take title to this land upon the sale which had been made to him by the master in the earlier part of that year. For several years previously the mortgage had been pledged by Butler to Anderson as security for his debt, and the question arises whether, in view of these facts, Butler could acquire and stand upon, as against Henry Anderson or those holding in his right, a title to this land based on his neglect to pay a lawful assessment upon it (for we are now assuming that it was lawful) while he was the owner, and which he was bound to pay or cause to be paid. We think the obligation of good faith would prevent him from doing this. It is true he did not warrant the title. But it was not necessary that he should have done so, if, by his relation to the property and to other parties having an interest in it, he was precluded from building up a hostile title to it in derogation of his contract. Dorr did not obtain the deeds upon his certificates of purchase. But he had the right to have them. The title, assuming the proceeding to have been legally sufficient to

found one, never came to him. But this circumstance is not very material. When Butler purchased the certificates and later obtained the deeds, they came into the hands of one who, as against the title derived from Henry Anderson, had been originally charged with the obligation to pay the taxes, and although that obligation did not rest upon Dorr, it revived and attached to Butler, and effectually precluded him from setting them up as muniments of title in himself as against the title which he had for his own purposes created in another. This doctrine is now well settled.

Bispham's Equity, Sec. 265.
Kennedy v. Daly, 1 Sch. & Lef. 355, 359.
Church v. Roland, 64 Pa. St. 432.
Ashton's Appeal, 73 Pa. St. 153.
Sawyer v. Wisard, 9 Allen 39.
Kost v. Bender, 25 Mich. 516.
Dubois v. Campau, 24 Mich. 360.
O'Connell v. Pate, 59 Fed. 182, 184.

* * * * * *

And, indeed, the doctrine has frequently been recognized as having a peculiar adaptation to the case of one who has acquired a deed for land for taxes which he ought to have paid, especially where, as between himself and another person, he ought to have paid the taxes. A mortgagor cannot set up against his mortgagee a title founded on his default in paying the taxes. And in Smith v. Lewis, 20 Wis. 350, it was held to apply to a mortgagee as against the assignee of a mortgage. And if, in this case, Bissell, the mortgagor, had continued to be the owner, he would in like manner have been precluded from setting up a hostile tax title founded on his own default. Upon an abundant citation

of authorities. Judge Cooley sums up the doctrine thus: "There is a general principle applicable to such cases which may be stated thus: That a purchase made by one whose duty it was to pay the taxes shall operate as payment only; he shall acquire no rights as against a third party by the neglect of a duty which he owed to such party. This principle is universal and is so entirely reasonable and just as scarcely to need the support of authority. Show the existence of the duty, and the disqualification is made out in every instance,' and then, after giving numerous illustrations, he says further: 'In all such cases and all to which the like reasons apply, the purchase as between the parties is in law a payment only; or if made at second-hand from another who was purchaser at the public sale, it is allowed to operate for the purposes of justice only, as a redemption.' Cooley on Taxation (2d Ed.) 501-3; 3d Ed., Vol. 2, 964, et seq. But counsel answers this by saying that this could not affect the legal title, that it might raise an equity but this could not be regarded in an action of ejectment where only the legal title is in issue. It is undoubtedly the rule that the plaintiff must have the right of possession, and this usually follows the legal title. But if the defendant is under an estoppel which precludes him from the right to deny the title of the plaintiff, he cannot maintain the right to possession under a hostile title which he is estopped from asserting. The fundamental question in an action of ejectment is to whom does the right of possesion belong?

Cincinnati v. White's Lesee, 6 Peters 431.

Dickerson v. Colgrove, 100 U. S. 578.

The question of the legal title is generally the leading factor in determining that right, but it is not in all circumstances the ultimate test. But if the acquisition of the tax title by Butler operated only as redemption, there is no occasion for invoking the doctrine of estoppel."

Custody of Property in the Sta Courts.

Although its ultimate purpose is not made manifest, a brief argument is submitted under this heading, and some authorities cited, which are supposed to show that the custody of the property involved in this litigation has been in the State Court, and must be administered therein.

The levy of the execution referred to was based upon a judgment for $5,162.72, rendered by the Common Pleas Court of Lucas County, Ohio, *in favor of Emily O. Butler,* recovered against the petitioner at the April Term, 1907, of that Court. (Tr. 520). From the answer and cross bill of Emily O. Butler it appears that this judgment was based upon a note executed *September 27th, 1906,* for five thousand dollars. On the same day, it appears that Messinger executed his mortgage to secure said note, and purporting to cover the property involved herein. (Tr. 404-405.)

This action was commenced on December 27th, 1904. It was in terms against the petitioner only, but Emily O. Butler, through her counsel, appeared in every stage of the proceedings. (Tr. 569-570). She was thoroughly aware of everything that was going on, and actively participated in the various trials that were had prior to the date that she loaned Messinger the money, and took his note, on which the judgment was based.

> "The general rule is that one not a party to a suit is not affected by the judgment. The exception is that one who acquires an interest in

> property, which is at that time involved in litigation in a court having jurisdiction of the subject matter, and of the person of the one from whom the interests are acquired, from a party to the proceeding, takes subject to the judgment or decree, and is as conclusively bound by the result of the litigation as if he had been a party thereto, from the outset. * * * Where a purchase is made of a right acquired with actual notice of the pendency of a suit relating thereto, there is no question but that the person acquiring the rights in the property takes subject to the decree." 25 Cyc. 1450-1451.

As appears from the record, the levy attempted to be made was purely a paper one, the officer not attempting to take the property into his actual possession and not actually effecting a seizure of the res.

It would be a severe reproach upon the law, if, under the circumstances shown here, a *lis pendens* mortgagee, who has actively participated in the trial of a lawsuit involving the title to property, could, after such active participation, effect a loan to the defendant, take his notes therefor, obtain judgment thereon, levy execution upon the property, and deprive the original plaintiff of his rights. We cannot believe that this Court would countenance such a result.

It is perfectly apparent from the record that the estate of Charles Butler warranted the title to Calvin Bronson, the petitioner's predecessor in title, and that Messinger will have, in the case of an affirmance by this Court, a claim against that estate on the

warranty of Butler. Mr. Snider testified (Tr. 570) that Miss Butler is the sole heir at law of Charles Butler, deceased.

From this, it is quite clear that Miss Butler felt herself safe in loaning five thousand dollars to Messinger. If she were called upon, as the sole heir at law, of Messinger's warrantor, to make good the warranty which her ancestor had given Messinger, her measure of liability would be reduced by the five thousand dollars loaned him. If Messinger should prove victorious in the litigation, her five thousand dollars was amply secured. Thus, it is beyond cavil that she could not occupy the attitude of a bona fide purchaser without notice and thus the doctrine of *lis pendens*, above quoted, applies wth full force.

Conclusion.

This case has dragged its weary way along a tortuous and winding path for seven years. The activity of counsel for the petitioner has made the path of respondent a stormy one. The concurrence of the United States Mortgage and Trust Company has produced no lull in the storms that beset this path. Miss Butler, though not a widow, has contributed her mite to the respondent's vicissitudes. Many times, since the beginning of the litigation, it has seemed to counsel for respondent that the limits of patience and of human endurance had been reached. Each time the Circuit Court of Appeals swept away the obstacles presented in the way of respondent's coming into his own, the petitioner, or some one acting in his ultimate interest, invented some new instrument of delay. Thus, this case, with its various ramifications and side issues, has approached, if it has not fully entered the class of Jarndyce and Jarndyce. It is to respondent and his counsel a matter of congratulation that the end is near, and with the fullest measure of confidence in the end which will be attained, this brief is respectfully submitted.

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C. H. TRIMBLE,
Attorneys for Respondent.

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IN THE

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October Term, 1911.

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ROSEWELL E. MESSINGER,

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vs.

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Respondent.

REPLY BRIEF FOR PETITIONER.

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Proceedings and Facts.

In the brief of counsel for respondent (at page 1) it is conceded that the abstract of issues and proceedings in petitioner's principal brief is substantially correct.

Four exceptions, however, are specified:

1. "In the statement (on page 4 of the brief) that on the second trial in the circuit court Messinger proved and relied upon title established by certain tax deeds, etc."

The facts and law with respect to this claim are discussed at length in principal brief for petitioner on pages 158 to 171, and on page 135, and we respectfully submit, is fully sustained.

2. In the statement (on page 4 of the brief) "that Anderson *voluntarily* appeared in the foreclosure suits brought by the United States Mortgage & Trust Company."

It is contended that this is misleading in that it suggests that Anderson had an alternative before him.

Respondent was brought into the foreclosure suits in the state court in the same way that petitioner was brought into the federal court in the action now under review,—by due process of law. Counsel for respondent (page 2 of the brief) say:

> "Mr. Anderson could have been brought in by publication and a judgment rendered under such circumstances would have been binding on him, assuming it otherwise to have been a valid judgment."

We agree with this statement. We are, however, unable to see how the decrees entered by the state court in the foreclosure suits were any less conclusive against respondent because, without raising or making the slightest objection he personally appeared in each suit: on leave duly obtained, filed demurrers, which were argued and submitted; the judgment of the court taken thereon; issues then joined with Messinger on his cross-petitions therein; trial had and an appeal taken to the state circuit court, where after trial decrees were again entered against Anderson and in favor of Messinger.

We respectfully submit that not only was respondent's appearance in the common pleas court voluntary, but that his appeal to the state circuit court was equally so.

> "Where parties voluntarily, and without objection, submit their controversy to a court having jurisdiction of the subject-matter, and the cause

proceeds therein regularly to trial and final judgment, they will be held to have waived their right to object to the jurisdiction of that court even though the cause may have been taken to it by appeal from an inferior court which had not jurisdiction of the subject-matter."

In the Matter of the Estate of Mabel Crawford, Deceased, 68 O. S., 58, 86-7 (3rd Syl.).

For Ohio statutes and authorities concerning appeal see principal brief, pages 146 to 151, both inclusive.

3. Counsel for respondent next refer to the execution issued and levied by the state court in the foreclosure suits, but we do not understand that they claim any fact concerning this execution is misstated. We do not deem it necessary to discuss this question further, but in connection therewith respectfully refer the court to the provisions of Section 5236 of the Revised Statutes of Ohio, now Section 12237 of the General Code, quoted at length on page 148 of principal brief. Certainly the lien fixed by the final decree of the common pleas court of Lucas County, Ohio, on the premises in controversy was not removed or vacated by the appeal, but has continued and is yet in full force and effect.

4. It is contended that the record does not show that bill of exceptions was taken on application made by petitioner before entering upon the last trial in the circuit court herein for stay of proceedings. The bill of exceptions is embodied in and comprises the first part of petitioner's principal bill of exceptions appearing at pages 306 and 307 of the Transcript of Record.

The ruling upon this matter was probably within the personal discretion of the circuit court and on the authority of *Fidelity Company vs. Bucki Company*, 189 U. S., 135, is not assigned here for consideration by this Honorable Court

On pages 4 to 6 in respondent's brief three statements of essential facts are criticized:

1. "Mr. Butler, after February 22, 1843, was continuously in possession and control of the property and paid all of the taxes and assessments thereon until 1860."

It is contended that this statement is refuted by the tax deeds offered in evidence by petitioner. Certainly these deeds evidence the payment of taxes by the grantee, Charles Butler. It is not claimed that the taxes were paid in the several years in which they accrued. The fact is otherwise, and is discussed in petitioner's principal brief at page 165

If Mr. Butler was not in possession we would like to inquire who was, and if he did not pay the taxes who did?

2. It is claimed that the record does not show an investigation by Anderson's representatives of testator's title to the Toledo property.

We respectfully submit that it must be presumed that Anderson's executors and trustees in the regular discharge of their duties fully investigated the facts with respect to Mr. Butler's indebtedness and the interest claimed by testator, Henry Anderson, in the Toledo property.

3. Counsel further claim that it should appear that they offered in evidence the several agreements between Charles Butler and William and James H. Anderson, respectively:

> "For the sole purpose of showing that the relation of mortgagor and mortgagee existed between Mr. Butler and James H. Anderson up to October, 1852, and that Mr. Butler had expressly obligated himself to pay the taxes on the property and that the relation of mortgagor and mortgagee extended only to the life estate."

It does not expressly appear that the first of these agreements between Mr. Butler and William Anderson was offered subject to such limitation, but we have no doubt

counsel intended and desired to so limit its effect At the time petitioner objected to any such limitation thereof and it appears at page 567 of the Transcript that the court thereupon stated that the evidence was in the record *for any competent purpose* and overruled petitioner's objection thereto to which exception was duly entered. We respectfully submit that it did not rest with respondent or his counsel to limit the effect of this evidence and if competent for one purpose germane to the issues it was necessarily competent for all like purposes.

In brief for respondent on page 6 it is further stated "there are other inaccuracies in the abstract of issues and proceedings and also in the statement of essential facts."

From the facts stated in petitioner's principal brief counsel for respondent reached different conclusions from those contended for by petitioner, but we believe respondent in his brief specifies no other material differences.

The foregoing analysis of the exceptions by respondent to the abstract of proceedings and statement of essential facts in petitioner's principal brief, demonstrates the substantial accuracy of such abstract and statement.

We shall be amply rewarded if by our efforts the facts presented in a somewhat voluminous record, are set forth with reasonable clearness and the time of this Honorable Court thereby saved.

Burgess vs. Seligman.

On page 23 of respondent's brief *Burgess vs. Seligman*, 107 U. S., 20, is cited. The principal question in this case, as stated by the court in its opinion at page 26, was whether the Seligmans, within the meaning of the law, were or were not stockholders in a certain railroad company, a question general in its scope and clearly distinguishable from questions pertaining to titles to real estate.

The distinction is clearly expressed by the court in the course of its opinion at page 33:

> "When the case was under the consideration of the (federal) circuit court, no construction of the statute (of Missouri) had been given by the state tribunals contrary to that given by the circuit court. * * * * * Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effects of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. *Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is.* * * * *The federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.* Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts."

Effect of Power of Disposition Upon Executory Devise.

At page 31 of respondent's brief it is claimed that the power given by Anderson's will to his sons to make wills on their arriving at 21 years of age would render an executory devise illegal, and that therefore, the sons took a life estate, instead of a fee defeasible upon their dying without issue.

On this subject in Page on Wills, Sec. 575, it is said:

> "It frequently happens that testator confers either special or limited powers of disposing of property upon one who has an estate in such property. Some interesting questions are presented as to what effect conferring such power has upon the duration of the estate given by the will. Where the estate given by the will

> is clearly a fee, this estate is not cut down to a life estate or any less interest by the fact that testator, out of abundant caution, has thought it necessary to give specific power of disposition to the tenant."

We submit that the modern law of wills wholly supplants the technical rules and distinctions relating to wills formerly in force in England, and at an early day in this country. A good example of the modern view of the law is given in the case of *Roberts vs. Lewis*, 153 U. S., 367, cited in petitioner's principal brief, page 61.

In this case the testator, Jacob Dawson, by his will devised to his wife, Editha J. Dawson, his property as follows:

> "* * * I give and bequeath all my estate, real and personal, of which I may die seized, the same to be and remain hers, with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike." * * *

It was claimed by counsel for the purchaser from the children of Mrs. Dawson that she, the widow, having remarried, all power under the will was terminated, and that the devise authorizing her to sell the property was void, or was terminated by her remarriage.

In that case this court held, at page 367, that the widow "has power during widowhood to convey to third persons an estate in fee simple in the lands of her late husband."

This decision was based upon a statute of the state of Nebraska, substantially a copy of the Ohio statute, to the effect that every devise of lands in any will hereafter made shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall *clearly* appear by the will that the devisor intended to convey a less estate.

The claim made in the above litigation was substantially the same as is made by the respondent in this case. It was there claimed that the widow took only a life estate, and that her power to convey ceased with her widowhood, but the court applied the Nebraska statute to the will and wholly disregarded the claim, which we submit is equally applicable to the Henry Anderson will.

But in the case under review no question now exists concerning an executory devise. As testator's son, James H. Anderson, left a lineal descendant, the respondent, there was and could be no limitation over, and no executory devise. The question is, therefore, eliminated.

Contract of October 4th, 1844, Etc., Incompetent to Attack or Destroy Petitioner's Record Title.

On page 37 of respondent's brief the competency of the contract of October 4, 1844, and other unrecorded evidence, to destroy petitioner's record title to the property in controversy is discussed.

This question is considered in petitioner's principal brief on pages 99 to 102, both inclusive, to which we again respectfully refer the court.

Respondent's counsel felicitate themselves upon the fact that this contract and certain other unrecorded evidence were offered upon the first trial herein by both parties. Certainly this would not enlarge its legal effect, or give it any additional weight. We repeat that evidence of this class was clearly incompetent to sustain or destroy the record title and that the circuit court of appeals erred in giving it such effect.

We are surprised to find that counsel for respondent, at pages 38-39 of brief, in the quotation made from *Dodge vs. Freedman's Savings & Trust Company*, 93 U. S., 379, quote only such portion of the paragraph of the opinion appearing on page 383 as might be construed as sustaining their position, and omit the portion opposed to their view.

They quote as follows:

> "The declarations of a party in possession of land are competent evidence as against those claiming the land under him." Citing authorities.

The entire paragraph and the one next following are as follows:

> "The declarations of a party in possession of land are competent evidence: 1st. As against those claiming the land under him. *Warring vs. Warren*, 1 Johns, 340; *Jackson vs. Cole*, 10 id., 377. The Freedman's Bank claim nothing under Huntington. They insist that they are the legal holders of the notes, and as such are entitled to avail themselves of the security given for their payment. 2d. Such declarations are competent only to show the character of the possession of the person making them, and by what title he holds, but not to sustain or to destroy the record title. *Pitts vs. Wilder*, 1 N. Y., 525; *Gibney vs. Marchay*, 34 id., 301; *Jackson vs. Miller*, 6 Cowen, 751; *Jackson vs. McVey*, 15 J. R., 234. To show that the party went into possession under the lessors is a common instance of the admissibility of such declarations. *Jackson vs. Dobbin*, 3 Johns, 223.
>
> Conceding, therefore, that Huntington was in possession of the premises, *his declarations are competent only to show the character in which he claimed*, as that of tenant under a lease, or tenant by virtue of an executory contract to purchase. His declarations as to the ownership or payment of the notes are incompetent upon every principle, and must be laid out of view in determining the case."

On page 39 of respondent's brief a reference to and quotation from 1 Elliott on Evidence, Edition 1904, Section 261, is made.

We respectfully refer the court to Section 264, of the same work, and quote therefrom as follows:

> "Former Owners. As already stated, the admissions of a party are usually receivable against his privies who are identified in interest with him. In accordance with this principle the admissions of a person in disparagement of his title, *not in contradiction of a record title*, are receivable against

> those claiming under or through him, and identified in interest with him." (Italics are ours.)

On page 39 in respondent's brief counsel cite and quote a part of Section 1080, 2 Wigmore on Evidence.

In paragraph 3 of Section 1082 of the same author it is said:

> "Thus in some jurisdictions it is common to state the general principle of admissions in a limited form, namely, to be receivable so far as they concern the character or extent of the grantor's possession."

And in considering this section *Dodge vs. Freedman's Savings & Trust Company*, 93 U. S., 379-383, is obscurely cited in a lengthy note on page 1291, as establishing the federal rule to be that declarations of the character under consideration are *"admissible but only to show the character of the possession and by what title he holds."*

We respectfully submit that counsel for respondent are mistaken in their conclusion as to the rule announced by this Honorable Court in *Dodge vs. Freedman's Savings & Trust Company, supra.*

The rule adopted by this Court is approved in Vol. 1 of the Encyclopedia of Evidence, page 518.

See also Abbott's Trial Evid., 2d Ed., p. 899.

Counsel for respondent throughout their brief, in their discussion of the effect of the foreclosure proceedings, the contract of October 4, 1844, the master's deed, etc., at no time mention, and are careful to avoid any consideration of the basic fact offered in evidence by respondent in chief, that Anderson first acquired his title to the Bissell mortgage in trust, (Tr., 309) (petitioner's principal brief, page 13) and that he thereby himself assumed the burden of proving the determination and discharge of such trust by clear and satisfactory evidence. We respectfully submit that this requirement was not met. This question is discussed in petitioner's principal brief at pages 92 to 98, to which we respectfully refer the court.

Section 4134, R. S. O.

On pages 40 and 41 of respondent's brief counsel cite and quote Section 4134 of Bates' Annotated Revised Statutes of Ohio. This section was passed May 4, 1885, and took effect July 1, 1885. (See 82 O. L., 230.) This section, therefore, has no application to the controversy herein.

Probate of Will in Ohio.

On page 43 of respondent's brief it is said:

> "It is indisputable that the will of Henry Anderson was put of record before the sale to Bronson was consummated."

We respectfully submit that the date of such probate nowhere appears in the first record herein. It does appear in the record of the second trial. (Tr., 216.) The will was probated in Lucas County, Ohio, April 20, 1860, about sixty days after Mr. Butler sold the premises in controversy to Mr. Bronson by written contract dated February 18, 1860, duly recorded in the records of deeds of Lucas County, Ohio, March 3, 1860. (Tr., 211.)

Petitioner was Properly Released from Stipulation.

At pages 77 to 79 in brief of respondent, counsel complain, because the circuit court relieved petitioner from the provisions of a stipulation concerning the delivery of the executors' and trustees' deed. We deem it unnecessary to discuss this question. It was not only a matter within the discretion of the trial court, and, therefore, not reviewable here, but, as respondent did not apply for a cross writ of certiorari herein, this Honorable Court will confine its consideration to the examination of errors assigned by petitioner.

Hubbard vs. Tod, 171 U. S., 474.
French Republic vs. Saratoga Vichy Co., 191 U. S., 427, 440.

Mr. Butler Paid His Debt in Full.

It is difficult to understand the position assumed by respondent's counsel in their brief concerning the credits which should have been allowed to Mr. Butler on his indebtedness.

On page 62 of respondent's brief it is said:

> "It is true that the record fails to show that Anderson's check for $6,921 was given to the master who conducted the sale, and that the master's check was in turn given to Anderson, as a credit upon the note which Anderson held against Butler," * * * *

And on page 63 of respondent's brief it is said:

> "It is true, as argued by counsel for petitioner, that the executors, in their subsequent dealings with Butler, charged him with the full face of the $20,000 note, and interest from its date, and made no deduction or credit for the property involved herein."

This admission, we respectfully submit, in effect concedes the claims asserted by petitioner that Mr. Butler received nothing for the property paid his debt in full, and leaves it reasonably certain that the circuit court of appeals was not warranted in reaching an opposite conclusion.

Counsel for respondent persistently ignore the contract right of Charles Butler to have had endorsed upon his $20,000 note a credit in the sum of $7,340, October 1, 1853, in accordance with the express provision to this effect in the note for said amount.

The argument made in behalf of respondent proceeds upon the mistaken assumption that the whole is greater than its parts.

We have endeavored to point out in our principal brief that the $7,340 note should have been applied and credited as above stated, and that the full amount of this note, principal and interest, aggregating $11,133.19 was afterwards paid.

The computation made in petitioner's principal brief on pages 105 to 111 follow, we respectfully submit, the accepted rules for such calculations.

There is nothing peculiar or unusual about the method employed, nor is there one dollar of duplication of credits.

$20,000, with interest from July 21, 1841, to the final date of the last payment, made by Mr. Butler, aggregating a little over $39,000, was indisputably paid in cash.

It makes and could make no difference that this was separated, first to satisfy the note of $20,000, and interest, within the life of the trust, and that thereafter $7,340 of the amount of the indebtedness originally evidenced by the $20,000 note was evidenced by note for said amount since such note with interest thereon, was fully paid.

We respectfully submit that there is neither confusion nor uncertainty in the computations which we present, and to which we again respectfully refer this Honorable Court.

It should also be noticed that there is not a suggestion of evidence in any of the records herein that there ever was any other indebtedness due from Mr. Butler to Henry Anderson, or his estate, or to either of his sons, than that which was originally evidenced by the note of $20,000. This note respondent did not produce or account for, and we respectfully contend that it was conclusively presumed to have been paid. The note for $7,340 was produced by petitioner duly endorsed by the executors and trustees of Henry Anderson. (Tr., 528.)

By no evidence is it explained in what manner the note for $7,340, or the executors' and trustees' deed, which of itself amounted to a release in full, could ever have found its way into the possession of Charles Butler unless he had paid his indebtedness in full.

We note with regret, throughout respondent's brief, the repeated unnecessary aspersions upon the character of

Charles Butler. All the evidence shows his ability, his integrity, and his constant purpose, in times of panic or prosperity, not to repudiate but to squarely meet and fully satisfy his financial and other obligations.

The existence of the trust in Henry Anderson, was specifically and definitely recognized while the matter was current, and could be fully considered, by the following persons: William Anderson, James H. Anderson, respondent's father, Peter Anderson, the testator's brother, and who, in respondent's view of the will might have become entitled to share in the Toledo property had no trust existed; also Walter Goodman and Peter W. Lucas.

When it is considered that Henry Anderson himself acquired his interest in the property in trust as recited in the assignment of the Bissell mortgage, it would seem to take much assurance on the part of respondent to now call in question and to attempt to repudiate and stultify the solemn and deliberate acts expressed in writing by all these parties. The trust stands supported six against one.

Conclusive Effect of State Judgments and Decrees.

With respect to the conclusive effect of the state judgments and decrees we respectfully refer the court to the case of *Lessees of Parrish vs. Ferris, et al.*, 2 Black, 606, cited and quoted with approval in *Northern Pacific Railway vs. Slaght*, 205 U. S., 122, 132. We cite these authorities in our principal brief but do not there examine them.

The case reported in 2 Black, *supra*, was an action in ejectment to recover certain land in Ohio. The plaintiff claimed title under the will of Andrew Ferris. The defendants, by way of defense, claimed title under the same will, *and in addition* set up in bar of recovery a previous suit between the same parties in the state courts of Ohio, based upon Section 5779 of the Revised Statutes of Ohio, in-

volving the same title and in which a judgment or decree was entered in their favor. The construction of the will, the rights of the parties generally under these issues, and the effect of a former judgment in Ohio under the statute cited, were all considered, and the court announced the well settled rule of law that a controversy once decided by a competent tribunal cannot be re-examined by another court of concurrent jurisdiction in a suit between the same parties or their privies.

To the same effect are the following Ohio authorities:

Hixson vs. Ogg, 53 O. S., 361.
Grant vs. Ramsey, 7 O. S., 158.
Hinton, Admr., vs. McNeil, 5 Ohio, 509.
Shoemaker vs. State, 68 O. S., 603-612.
Rempke & Sons vs. Ravens, 68 O. S., 113-124.

Respectfully submitted,

HARRY E. KING,
OLIVER B. SNIDER,
CLAYTON W. EVERETT,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 150.

ROSEWELL E. MESSINGER, PETITIONER,

vs.

PETER ANDERSON, RESPONDENT.

MEMORANDUM CONCERNING RECENT DECISION OF SUPREME COURT OF OHIO.

Since the argument and submission of this case to this honorable court, the Supreme Court of Ohio, on March 12, 1912, affirmed the proceedings, final decree and decision of the Circuit Court of Lucas County, Ohio, in the consolidated foreclosure suits, constituting part of the record herein, entitled *Trust Co. vs. Anderson, Messinger et al.*, the entry on the docket of the Supreme Court therein, No. 11434, entitled *Anderson, plaintiff in*

error, vs. Trust Company, Messinger et al., defendants in error, being as follows:

> "Judgment affirmed on authority of *Peter Anderson vs. The United Realty Company et al.,* 79 O. S., 23, affirmed by the Supreme Court of the United States, December 4, 1911."

By letter from the clerk of the Supreme Court of Ohio we are informed that no opinion will be rendered by the court in this case.

This affirmance by the Supreme Court, without report, leaves the decisions of the circuit court, opinion per Wildman, J., rendered April 4, 1908, and reported in 30 Ohio Circuit Court Reports, 491, 553, the final announcement in Ohio of the law in these consolidated cases.

Respectfully submitted,

HARRY E. KING,
CLAYTON W. EVERETT,
OLIVER B. SNIDER,
Counsel for Petitioner.

[16829]

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IN THE

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OCTOBER TERM, 1911.

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ROSEWELL E. MESSINGER,

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Respondent.

SUPPLEMENTAL REPLY BRIEF FOR PETITIONER.

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OLIVER B. SNIDER,
CLAYTON W. EVERRETT,
Counsel for Petitioner

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SUPPLEMENTAL REPLY BRIEF FOR PETITIONER.

The Will.

In reply to the assertion by counsel for respondent, on page 20 of their brief, that the cases cited at page 80 in petitioner's principal brief, on the construction of the Anderson will, are not in point, we below respectfully submit the substance of a number of the wills, and the construction placed thereon in such decisions, not already examined at length.

Without the provisions concerning limitations over, it must, we think, and no doubt will be conceded, that the Anderson will in the first instance contains language sufficient to express or to convey a fee.

As stated by Mr. Schouler on Wills, p. 262, par. 549, it is now everywhere conceded that neither the word "heirs" nor other words of inheritance are necessary in a will to pass a fee. And we respectfully submit all the decisions show that no distinction is now made as to whether the will contains words of inheritance or not so long as it is affirmatively shown, as here, that all of the testator's interest, property, or estate is intended to be included.

It is further settled that a fee given in the first instance may be cut down by subsequent *words* in the will. But not by subsequent *silence*, or by nothing being said on the subject. To have this effect the subsequent expressions must not only be equal in force to the preceding expressions devising a fee, but must necessarily be sufficiently definite to clearly overcome such a devise.

In the Anderson will nothing whatever is said about any estate of any kind for the lineal descendants, if there should be any. The subsequent language has nothing to do with the *quantum* of the estate conveyed, as we view it, but simply expresses a condition upon which the same estate, a fee, may go over to collateral relatives.

We further respectfully submit in the matter of the construction of wills that the rule that every part of a will must be given effect, if possible, is subordinate to the rule that a devise shall be deemed a fee simple, unless limited by express words. This view is clearly stated in the late case of *Winfree vs. Winfree*, Tex. Civ. App., 139 S. W. Rep., 36, Syl. 6.

ALABAMA.

In *Newsom vs. Holesapple*, 101 Alabama, 682, it appears, from the syllabus, par. 2,

> that a testator gave to his grandson certain property with the condition, that if the grandson die, leaving no legitimate issue at his death, the property devised should go to another named devisee. *Held*, that the grandson took a conditional fee, defeasible on his dying without issue, and on his death without issue, the latter devisee became entitled to the property.

GEORGIA.

On the first hearing in the circuit court of appeals herein, counsel for respondent in their brief, laid special stress upon and quoted at length from the case of *Wetter vs. United Hydraulic Cotton Press Co.*, 75 Ga., 540, as supporting the doctrine of an implied remainder.

In its opinion, 146 Fed., 929, 941, the court rests its decision in part upon this Georgia case, a wholly discredited authority in that state, as appears in *Hill vs. Terrell*, 123 Ga., 49.

This case is, we submit, directly in point, and we invite particular attention thereto:

In the opinion, page 55, the court say:

> 'The controversy arises over the proper construction of the fifth item of the testator's will. In it he provided, that after the payment of specific legacies and the expenses of administration, all the remaining money in hand, or that might be due him, should be invested by his executors in bonds or mortgages 'for the benefit of the children my said daughter now has, or may hereafter have born, share and share alike'; that 'whenever any one of her children shall arrive at the age of twenty-one years or marries, then he or she shall receive his or her share of said fund at that time, and the balance thereof continue to be invested,

drawing interest, for the benefit of the others'; that in the event any of her children should die before marriage or arriving at the age of twenty-one years, his or her share of said fund is to be equally divided between her surviving children or their legal representatives, to-wit, her grandchildren, provided any of her children should die leaving children.' Then follow the words which especially require construction. They are as follows: 'It is also my will, desire and intention, that if either of my daughter's children should depart this life after marriage, and should die without leaving any child or children at the time of his or her death, that his or her share of all or any part of the property, or the proceeds thereof, in whatever the same may be invested, herein devised or bequeathed by this will or any clause thereof, shall revert to and be equally divided between her surviving children and their legal representatives; and my executors are hereby directed to take a receipt from each legatee to that effect.' The plaintiff contends, that, under this item of the will, the granddaughter of the testator took an estate in fee, subject to be divested if she should die after marriage without leaving child or children; that she having a child at the time of her death, the condition upon which her estate might have been divested no longer existed; and that her estate being absolute at her death, her husband and child were entitled to share equally in the property so left by her. On the other hand, the defendant contends, that, under this item of the will, the testator created a life-estate in his granddaughter, Kittie Hill, with remainder to such children as she might have at the time of her death; that having only one child, the entire estate passed to it; and that her husband took nothing as heir of his wife.

It is clear that the estate bequeathed by the testator of his granddaughter was not expressly limited to a life-estate. Neither is there any express gift or bequest to the children which she might leave. The question, then, is narrowed to this: Did the testator intend such a limitation or remainder to arise by implication, and did the language employed by him create such a limitation or remainder over? Since 1821, it has been the law of this state that the word

'heirs,' or its equivalent, is not necessary to create an absolute estate; but every conveyance properly executed shall be construed to convey the fee, unless a less estate is mentioned and limited in such conveyance. (Civil Code, §3083.) Provisions in wills similar to that now under consideration have been construed a number of times by this court.

(Citing authorities.)

* * * * *

In *Burton vs. Black*, 30 Ga., 638, 644, a similar ruling is made, and the subject is fully discussed. Stephens, J., says: 'An obvious restriction upon the principle of reasoning by inference is, that resort to it shall be had only in the absence of expressed intention'; and he holds, that a bequest to one and his heirs would not create a fee simple more effectually under our laws than by being to him without the added words inheritance, and that the only effect of providing that the estate should go to some other person if the first taker should die without children is to attach a condition to the fee in him which would terminate it if he should die without children. A like construction has been placed upon similar bequests, in *Hill vs. Alford*, 46 Ga., 247; *Gibson vs. Hardaway*, 68 Ga., 370; *Matthews vs. Hudson*, 81 Ga., 120; *Chewning vs. Shumate*, 106 Ga., 751; *Davis vs. Hollingsworth*, 113 Ga., 210; *Sumpter vs. Carter*, 115 Ga., 893. Thus this court has held, with great uniformity, that unless there be something to indicate a contrary intent on the part of the testator, a devise or bequest to a named person, followed by a provision that if he shall die childless the property shall pass to some other person, conveys to him a fee, subject to be divested upon his dying childless, or, as it is sometimes called, a base or qualified fee, and does not confer upon any child which he may have any interest or estate in remainder in the property. Estates by implication are not favored. *McCord vs. Whitehead*, 98 Ga., 385. In the harmony of these decisions there is but a single note of discord"—which the court finds in *Wetter vs. United Hydraulic Cotton Press Co. (supra)*.

* * * * *

Concluding its opinion, the court at page 61, say:

> Construing the fifth item of this will alone, or in connection with the entire will, we are of the opinion that the estate created in favor of the testator's granddaughter, Kittie Hill, was an estate in fee, subject to be divested or terminated upon her dying without child or children at the time of her death; and that it did not create any estate in remainder in favor of her child. It follows that upon Mrs. Terrell's death intestate, after marriage, leaving a child, this share passed as any other fee-simple estate left by her."

In *Kinard vs. Hale*, 128 Ga., 485, the language of the will under construction reads:

> "To my beloved son, Jasper Sims, I give, devise and bequeath (certain land, describing it), with all the rights, members, and appurtenances to all of said land in anywise belonging, forever in fee simple; (also certain slaves, naming them); the property described and named in this article to remain in the hands or under the control of my son Sherod S. Sims as trustee for my son Jasper; and should my son Jasper die without leaving any child or children, the above described property is to revert back to my estate to be sold and equally divided amongst the legal representatives of my estate who may then be living."

Jasper Sims died without leaving children or representatives of children, after having conveyed the land to Mary A. Sims, under whom the plaintiff claims. It is therefore apparent, the court say, that the plaintiff is not entitled to recover the land unless Jasper Sims took an absolute fee simple estate therein by the terms of the will of his father, Sherod Sims.

On page 486 the court say:

> "This item of the will clearly and unmistakably indicates a testamentary purpose that the estate devised to Jasper Sims should be subject to be defeated

upon his dying childless. The fee which the devisee took in the land was a qualified or base fee; because there was a qualification annexed thereto that if he died without children it was to go over by way of executory devise to the others named in this item of the will. *Hill vs. Alford*, 46 Ga., 251. As was observed in *Hill vs. Terrell*, 123 Ga., 57, 'this court has held, with great uniformity, that unless there be something to indicate a contrary intent on the part of the testator, a devise or bequest to a named person, followed by a provision that if he shall die childless, the property shall pass to some other person, conveys to him a fee, subject to be divested upon his dying childless, or, as it is sometimes called, a base or qualified fee.' The estate devised to Jasper Sims was a fee, defeasible upon his dying without child or children. *Gibson vs. Haraway*, 68 Ga., 370. The title of the grantees of Jasper Sims was divested by his death without children, and the plaintiff was not entitled to recover the land."

ILLINOIS.

The doctrine of a defeasible fee under similar wills, is supported by numerous decisions in Illinois.

In *Friedman vs. Steiner*, 107 Ill., 125, the syllabus is:

"1. A testator, after making certain bequests, devised the residue of his estate to his wife, 'and unto her heirs and assigns forever, to the total exclusion of any and all person or persons whatsoever,' but upon the express condition that in case the wife, after his decease, should die intestate, and without leaving her surviving lawful issue, then all the rest and residue of the estate so bequeathed to the wife should be converted into money, and paid over by his executors, as follows: To A B, $5000, C D, $1000, etc.: *Held*, that the estate of the wife in the realty was not a mere life estate, with power to dispose of the fee by will, as that could not be inherited, nor was it an estate in fee simple, as it can not descend to her heirs generally, but the heirs of her body, but that her estate was an estate in fee determinable, which may be perpetual, or may be determined by

her death intestate, without lawful issue, or previous alienation of the land.

2. Under such devise the determinable fee granted to the wife may be changed into a fee simple absolute, either by the sale and conveyance of the land by her in fee simple, or by her death leaving a will granting the land to a devisee, or by her death leaving lawful issue.

3. One of the peculiarities of a 'fee determinable' is, that it may become a fee simple absolute upon the happening of any event which renders impossible the contingency upon which such estate is to end."

INDIANA.

In *Greer vs. Wilson*, 108 Ind., 322, the will gave a life estate, first to the wife and providing it should be cut down one-half in case she married, but she did not marry and her life estate terminated before the other questions arose.

The property then went to a daughter, Mrs. Greer, and her heirs, but subject to the proviso that, "in case my said daughter shall die without any heirs of her body surviving, or in case of such heir, and it do not survive to full age," then the property should go to his (the testator's) brother and his other relatives.

She died intestate leaving a son who survived to full age.

Certain judgments were recovered against William H. Greer, the husband of the daughter and an effort made to subject any interest he might have in the property.

The following portion of the opinion is, we respectfully submit, in point here, page 326:

> "In support of the objections to the proceedings below, it is sought to be maintained that Mrs. Greer took only a life estate in the lands devised to her, with a remainder over to her son Frank, the appellant here, contingent upon his arriving at full age, and that, consequently, William H. Greer neither inherited, nor succeeded to, any estate in the land sub-

ject to execution upon the judgment against him, or any other interest in the same; that for that reason the appellees derived no title through the sheriff's sale.

In response to the claim thus made on behalf of the appellant, it is contended that Mrs. Greer took an estate in fee simple determinable on a future contingency, and that hence her husband, in virtue of his marital rights, became seized in fee of an undivided third part of the lands at her death, determinable only upon the same contingency.

Washburn on Real Property, Vol. 1, pp. 61, 62, says: 'As every estate which may be of perpetual continuance is deemed to be a fee, and may come within the definition of Lord Coke, of a fee simple absolute, conditional, qualified, or base fee, this seems to be a proper connection in which to treat of them.' After giving some illustrations, the same author proceeds: 'The term determinable fee seems to be more generic in its meaning, embracing all fees which are liable to be determined by some act or event expressed in their limitation to circumscribe their continuance or inferred by law as bounding their extent.'

This definition of a determinable fee is well sustained by the authorities, and appears to us to be entirely applicable to the estate taken by Mrs. Greer in question. This must be so unless the intervening life-estate of her mother made some other rule of construction necessary, and we know of nothing either in principle, or inculcated by authority, which would give such an effect to the life-estate. It follows that Mrs. Greer, at the death of her father, became the owner of the real estate left by him in fee simple, subject only to the contingency that she should die without issue, or that her surviving issue should die before arriving at full age; in other words, that she became seized of a determinable fee in such real estate." * * * *

KENTUCKY.

From many decisions in Kentucky supporting the doctrine of a conditional or defeasible fee under wills, substantially the same as the Anderson will, we quote from two, the

first decided in 1843, three years prior to the execution of the Anderson will, showing that the doctrine was then fully recognized, by convincing reasons, and the other in 1909, showing its continuous recognition.

In *Hart vs. Thompson*, 3 B. Mon., 482, on pages 486-488, the court say:

> "The will of Nathaniel Hart, Sr., deceased, under which Simpson Hart claims, contains this clause: 'My will and desire is, that all my estate, both real and personal, be equally divided amongst my said nine children, then living, or their lawful heirs if dead, and if either of my nine children should *die without heirs of their body, lawfully begotten*, that *their part, so allotted and given them* as aforesaid, be *equally divided amongst my other children then living.*'
>
> It is contended under this clause of the will, that the devise to Simpson Hart, as well as the other devises, was the devise of a fee tail estate, which by our statute (1 Stat. Law, 442), is converted into a fee simple estate, and the conditions annexed thereto, restraining alienation, are abrogated, and Simpson Hart became invested with a pure and absolute fee, with the power of unlimited disposition of the estate as such. We cannot sanction this position.
>
> We are aware that the English Courts have gone great lengths in construing the language of a devise into the creation of an estate tail. Their policy and the genius of their government impels them to this construction, as the means of securing landed estate to the eldest son and his issue, sustaining family settlements and propping up their nobility. The policy and genius of our government dictates a different construction, or they allow that construction which approaches nearest to the intention of the testator, which should be the governing consideration in the interpretation of all wills, as well of the realty as of the personalty. But according to the strictest rule of English interpretation, we cannot regard the devise in question as a limitation over, after an indefinite failure of issue, which would constitute it an estate tail, but as a limitation over upon a fee, which vests the estate in the surviving children, upon the

death of either without *issue living* at his or her death, and is good as an executory devise.

The words 'to be divided among my other children *then living*,' shows that the testator looked to a definite period when the contingency, 'the death without lawful heirs,' was to happen, namely, whilst his other children were *then living*, and not to an indefinite failure of heirs of his body, and brings the case within the distinction taken in the case of *Pells vs. Brown*, Cro. Jac., 590; *Porter vs. Bradley*, 3 Term. Rep., 143; *Roe vs. Jeffrey*, 7 Term. Rep., 588; *Fosdick vs. Cornell*, 1 John. Rep., 439; *Anderson vs. Jackson*, 16 John. Rep., 382; 1 P. Williams, 534; *Jackson vs. Blanshan*, 3 John. Rep., 289; *Moffett vs. Strong*, 10 John. Rep., 12; *Jackson vs. Staats*, 11 John. Rep., 337. Although the authority of the foregoing cases is questioned by Chancellor Kent, in a very learned opinion, delivered in the latter case, in which he and others of the court dissent from the majority, we think that the principle of those cases at least is consistent with the policy and genius of our government, and whenever, as in the case before us, there is a clear indication of an intention on the part of the devisor to pass a defeasible fee only to the first devisee, with a limitation over to others, *then living*, at the death of the first devisee without issue or heirs of his body, so as to preserve the estate to his children, that such construction should be given to the devise as to carry out the object and intention of the devisor, and effectuate the purpose of the devise. This alone can be done by giving force and effect to it as an executory devise, limited upon a fee, which is to terminate at the death of the first devisee, without issue living at the time of his *death*."

In *Rice vs. Rice*, 133 Ky., 406, the terms of the will and the scope of the decision are sufficiently shown in the syllabus, paragraph 1:

"A will made certain devises to testator's two sons, and provided that if either should die without legal heirs then his portion should go to the other, or his children, if any, and that neither should have power to sell unless the proceeds should be invested in other

real estate. *Held*, that in view of the provision for sale the phrase 'if either should die without children' referred to the death of either son at any time before or after testator's death, and each son took a defeasible fee, which would be defeated by the death of the devisee at any time without issue then living."

MISSISSIPPI.

Since the testator, Henry Anderson, resided in Mississippi when his will was made, and when he died in 1846, special attention is called to the construction by the Supreme Court of that state of wills similar to his.

Sims vs. Conger, 39 Miss., 231, 310, passes upon a will which took effect by the death of the testatrix, in 1847:

The material parts of the will appearing on page 310, are:

> "Item 4. When my son Allison Wade Sims arrives at the age of twenty-one years, I give and bequeath to him all my estate, both real and personal.
>
> * * * * *
>
> Item 6. It is my will and desire that in case I survive my said son Allison Wade Sims that, in such event, one-half of all my estate be and is hereby bequeathed to my esteemed cousin, Isaac B. Conger, and the remaining half be and is hereby bequeathed to the children (seven in number) of my beloved brother, Jonathan L. Conger, (naming them).
>
> Item 7. It is my will and desire, should my said son Allison Wade Sims die without lawful issue, that all such property and its increase which it is hereby intended he shall inherit from me shall descend in like maner and proportions as set forth in item sixth."

On page 313 the court say:

> "Upon the face of the fourth and seventh items of this will, a plain case is presented of an estate in fee in A. W. Sims, on his reaching majority, determinable ***on his dying without issue;*** and upon that contingency, of an executory devise over to the parties

named in the sixth item. 1 Jarm. on Wills, 237; *Jordan vs. Roach*, 32 Miss. R., 481-604."

As appears by the last clause of the syllabus on page 233, the son survived the testatrix, and after attaining his majority and receiving the property, died without issue. Thereupon the court held the parties named in the sixth and seventh items of the will were entitled to the estate under the executory devises therein contained.

The syllabus of the important case of *Busby vs. Rhoades*, 58 Miss., 237, is:

"1. C. died in 1862, leaving a last will and testament containing this provision: 'I give and bequeath to my wife M., for and during her natural life or widowhood, all my personal and real estate, of whatever kind or description, which may be remaining after the payment of my debts; and at the death or marriage of M., to my daughter E.; and should E. die during her minority, or without issue, and after the death or marriage of M., then to R. and the children of S.' M., the widow, died in 1867, without having married. E., the daughter, married B., and died in 1878, without issue living. *Held*, in an action of ejectment by R. and the children of S. against B., that the estate given to E. was a fee-simple, commencing after the termination of the precedent estate of the widow, and defeasible on the contingency of E.'s death, after the death or marriage of the widow, without issue living. Code 1857, Art. 2, p. 306; Art. 8, p. 307.

2. The above recited provision of C.'s will contains a devise to E. of an estate in fee-simple, but determinable, with a limitation over dependent upon the expiration of less than three lives in being, and upon the dying of the holder of the precedent estate without issue living at the time of her death. This ulterior limitation by way of executory devise is good; and as the facts stated show that the contingency upon which it was to take effect has happened, the estate has vested in the remainder-men, R. and the children of S."

Halsey vs. Gee, 79 Miss., 193.

On page 194 reporter states:

"The facts were as follows: The late Greenwood Leflore (* * * *) died in 1865 leaving a last will and testament, the fifth item of which, the only material part in this controversy, was in these words:

'I give and devise to my two grandsons, Greenwood L. Halsey and John B. Halsey, the tract of land known as the 'Big Sand Place,' and in the event that either of my said grandsons should die without issue, then it is my will, and I hereby direct, that the land herein devised to him shall go to the surviving grandson, and in the event that both of them die without issue surviving, then it is my will that the land herein devised and bequeathed to them, together with all the bequests hereinafter made to them, revert to my son, John, and my daughter, Rebecca Harris, equally to be divided between them.'

John B. Halsey, devisee, died in July, 1900, leaving four children, now living, who are the apellants in this cause. Greenwood L. Halsey, devisee, died in October, 1900, without children, or descendants of children.

John B. Halsey and Greenwood L. Halsey, the first donees of the will, conveyed the land devised to them by the fifth clause of the will, the 'Big Sand Place,' by way of mortgage, to one Roach, as a trustee, to secure a debt to James J. Gee, who, said Gee and Roach, are the appellees in this cause."

The decision, being short, is quoted in full beginning on page 200:

The fifth clause of the will of Greenwood Leflore vested the fee simple to the Big Sand Place in the two devisees as tenants in common, with cross remainders over, contingent on the death of either without issue, and with an ulterior limitation if both should die without issue. Their joint conveyance vested in their grantee the fee as held by them—that is, subject to be divested and vested in the ulterior limitees if both levisees should die without issue. The death of John B., one of the devisees, leaving issue, destroyed the ulterior limitation by making impossible the contingency

on which it was to take effect, with the result that the fee was absolute and unconditional, instead of contingent. The complainants took by descent, and subject to the incumbrance of their ancestors; wherefore they are not entitled to have the deed of trust canceled. *Jarman on Wills*, Secs. 6, 7 (c) 17, p. 519 *et seq.*, *Nellis vs. Nellis*, 99 N. Y., 505 (3 N. E., 59); *Buel vs. Southwick*, 70 N. Y., 581; Code 1892, §§2435, 2430; *Jarman on Wills*, Sec. 3 (c) 29, p. 940 *et seq.*; *Busby vs. Rhodes*, 58 Miss., 237; *Carr vs. Porter*, 1 McCord. *Eq.*, 60.

Decree affirmed."

NEW HAMPSHIRE.

The case of *Burleigh vs. Clough*, 52 N. H., 267, so much relied upon by counsel for respondent is founded upon an express life estate as to the first taker, and this alone clearly distinguishes it from the Anderson will. Later decisions in the same court, construing wills similar thereto, support the doctrine of a defeasible fee.

Woodman vs. Madigan, 58 N. H. 6, was an action to establish the construction of a will. The residue of the testator's estate is given to Joseph, the defendant's ward, his heirs and assigns. But if Joseph "should die under age and unmarried, or under age and married and leaving no child living at his decease," "the said residue" is given to other persons. The plaintiffs, administrators with the will annexed, seek a decision of the question whether the income of the residue, during the minority of Joseph belongs to him. Thereupon, the court on page 7 say:

> "No time being expressly fixed by the will when Joseph is to receive the residue, it vested in him at the testator's death. The will gave him an estate in possession, defeasible by his death, during minority, without issue living at his decease. As the residue vested in him at the testator's death, the income derived from it, before defeasance, is his."

Kimball vs. Penhallow, 60 N. H., 448 was an action by executors for advice and direction of the court in regard to the following clause in a will, page 449:

> "I give and bequeath unto Harriett A. Penhallow, (and three others, naming them) children of Andrew J. Penhallow, $2000.00 each. In event of either the four dying without issue, his or her share to go to the survivors in equal parts, to have and to hold the same to them and their several and respective heirs and assigns forever."

And on page 451 the court say:

> "'Dying without issue' means without issue at the death of the legatee." (Citing several New Hampshire authorities).
>
> "2. The word 'issue' means child, grandchild, or other lineal descendant."
>
> "4. If either of the legatees shall die without issue, his or her share will vest in the survivors, free from the original limitation. If A shall die before B, C, and D, leaving issue, his share would go to his legal representatives. If B shall next die without issue his share would go to C and D, and A's heirs would take nothing in B's share. The children cannot be called a survivor. *The heirs do not take as purchasers, but as heirs.*" (Italics ours.)

NEW JERSEY.

In *Steward vs. Knight*, 62 N. J., Eq., 232 the language of the will, p. 233, is:

* * * *

> "I give and bequeath all the residue of my estate, after payment of debts, both real and personal, to my nephew, James B. Sinnickson, and in case he shall die without children, my will then is that both my real and personal estate be divided equally among his surviving brothers and sisters."

It will be observed there are no words of inheritance.

On page 246 the court say:

"Upon consideration of the whole case, the devise to James B. Sinnicksen must be held to have passed to him a fee simple estate, subject to be defeated if he died leaving no descendants. He died leaving six descendants, the children of his daughter, Mrs. Palmer, and thus performed the condition which made his estate a fee simple indefeasable."

NORTH CAROLINA.

That a defeasible fee is conveyed and not an implied remainder, under language similar to the provisions of the Anderson will, in North Carolina, is sufficiently shown by two leading cases.

In *Taylor vs. Maris*, 90 N. C., 619, the syllabus is:

"1. I give to my four daughters the plantation on which I now live. They may sell the land and divide the money, or one may sell to another, but they must not divide the land. * * * If any of my daughters die without issue, their portion is to be equally divided among the three survivors, etc. *Held*, there is no direction that the land shall be sold, but only that the devisees may sell if they wish to do so. And hence the land is not converted into personalty by the terms of the will.

2. *Held further*: Upon the death of the testator the daughters became seized as tenants in common of a fee simple estate, defeasible upon the death of any one of them without issue."

In *Trexler vs. Holler*, 107 N. C., 617, the syllabus is:

"A testatrix left certain property to one L. H., her sister, with provisions that, should she die without lawful issue, the property so devised and bequeathed to her should revert back to her estate: *Held*, (1) that L. H. took a fee simple estate, defeasible upon dying without issue; (2) the testatrix contemplated the happening of such contingency after her own death."

On the first hearing herein before the circuit court of appeals counsel for respondent cited and induced the court to follow the discredited and overruled case of *Carr vs. Green*, 2 McCord (S. C.), 75.

As shown on pp. 76 and 77 of our principal brief, this is one of three cases largely rested upon by the circuit court of appeals in its construction of the will 146 Fed., 929, 941. And this notwithstanding it was nullified as an accepted authority by an exactly opposite holding by a court of equal authority reported in the same volume, the next preceding case, *Carr vs. Jeanerett*, 2 McCord (S. C.) 66, and three years later was overruled and the opposite doctrine of *Carr vs. Jeanerett* adopted as shown in *Carr vs. Porter*, 1 McCord Ch., 60. And this opposite doctrine has been consistently upheld ever since by a long line of decisions by the highest court of South Carolina, a few of which decisions are cited on page 77 of our principal brief.

In *Carr vs. Jeanerett*, 2 McCord, 66, the analogy to the Anderson will is exceedingly close.

The syllabus reads:

> "W. made a residuary clause to his will in the following words: 'The rest and residue of my estate, both real and personal, to be equally divided between my two grandsons, Wilson and Thomas, and delivered to them at the age of 21 years; but should they die, leaving no lawful issue, in that case I give and bequeath the whole of my estate, both real and personal, to Richard Thomas and Mary Godfrey, Rebecca Potts and Thomas Ballow, to be equally divided between them.' *Held*, that Thomas (having arrived at 21 years, with issue), took an absolute estate under the will, and Wilson having died under age, and without leaving issue, Thomas became entitled to the whole estate; and upon the death of Thomas, leaving issue, his children took by limitation and not by purchase.

> That the intention of the testator ought to govern where it can be discovered is a good rule; but wherever the will is plain, unequivocal, and in technical law language, it is unnecessary to resort to that rule of construction."

In *Carr vs. Porter*, 1 McCord Ch., 60, after quoting the provisions of the same will construed in *Carr vs. Jeanerett*, the court held, as appears in the syllabus, that the son, *Thomas took a fee*, and *his issue could only take by descent from him and not as purchasers. But he having sold they took nothing.*"

The difference of opinion in the lower courts challenged and obtained the most painstaking and conscientious consideration by the court, and we submit that this decision presents a most convincing and comprehensive argument for the construction of the Anderson will, urged by the petitioner.

Discussing the terms of the will the court on p. 77 say:

> "The testator gives the whole estate to Thomas Willson, his grandson. What could we infer from such a devise, but that he intended to give him an estate transmissible to his issue by way of inheritance, and nothing more? But it is said that, by giving the estate over to remote relations, after the failure of issue, he has manifested an intention to provide a distinct benefit for the issue. Suppose he had given the property to Willson and his heirs. In such case, although the heirs were mentioned, no distinct interest would arise to them. They would have acquired no benefit, except the right of inheritance, in case the property remained undisposed of at his death. Suppose it had been limited to him and the heirs of his body, which would have been still stronger, yet the devise would have barred the descent. In this case, however, the testator has given a fee-simple to his grandson. He has given nothing to his issue. How then can we suppose that he intended to give a life estate to one to whom he has expressly given a fee simple, and that he intended a fee-simple to those to whom he has given nothing at all? To give it such a construction, we must not only infer

his meaning from what he has not said, but we must presume that he intended something directly contrary to what he has said.

And this brings us to the second proposition, which involves the inquiry, How far an estate may arise by implication? I have already admitted the abstract proposition to the whole extent which has been contended for. I have admitted that an estate may arise, may be enlarged, may be controlled, and even destroyed by implication. But the doctrine of implication must be received, subject to certain established rules and principles. It is a pretty well established rule of the common law, that when a contract is reduced to writing, nothing is to be implied which does not arise from the face of the writing. It is to be presumed, that when a person undertakes to express his ideas in writing, that nothing is to be left to inference. Therefore Mr. Fearne says, p. 49, 'raising an estate by implication, in direct contradiction to and denial of an express estate, is irreconcilable with the idea of implication.' In this case the testator has given a fee-simple to his grandson; he has given nothing to the issue. Would it not be incompatible with the express intention of the testator to imply an estate for life to the grandson, and a fee-simple to the issue? Again, it is laid down by Mr. Fonblanque that an estate is never implied to issue as purchasers. 2 Fonbl., 62. The same principle is recognized by Mr. Fearne."

* * * * *

Continuing on page 87 the court say:

"The testator gives to his grandson an estate in fee-simple, defeasible upon his dying without leaving issue. The devisee has an estate transmissible to his issue by descent. There is no necessity therefore of implying a direct gift to them, as they are entitled by the express terms of the devise to all the benefit which it is presumed the testator intended they should have. Without resorting to implication, all the words of the will are rendered operative, and it does not belong to the court to give them an operation different from their natural and legal import."

* * * *

VIRGINIA.

In Virginia out of many cases illustrating the rule as to the existence of a defeasibble fee under similar wills, a quotation from one is submitted.

In *Randolph vs. Wright*, 81 Va., 608, the substance of the will and decision appear in the syllabus:

> "By her will dated 1843, she, after giving some legacies, gives all of her propperty to her two sons, P. and E. By a codicil dated December 8, 1848, she qualified the estate in her property given to her sons with these words: 'Should either son die without a will or lawful issue, the surviving son must heir all the property given by me to him.' E. died in 1872 without lawful issue and without a will. P., by deed, conveyed the property, in 1874, to H., and after several intermediate alienations, it came to N. V. R. But the daughter, R., contended that under the will E. took a fee simple estate, and that upon his death, without issue and without a will, the estate descended to his heirs, viz: his brother and his sister R., in equal parts. And in the action of ejectment by R. against N. V. R. for the real estate—
>
> HELD: Under the will E. took a *defeasible* fee simple, coupled with a power of appointment by will, with remainder over to P., and that his *defeasible* fee simple estate having been defeated, viz: by his death, without issue, living at his death, and he having failed to exercise his power of appointment by will, the remainder to P. is good, and that the title of N. V. R. who claims under P., is also good."

ANALOGOUS CASE IN THE EIGHTH DISTRICT.

The case of *Yocum vs. Parker*, 134 Fed., 205 (8th Cir. Ct. of App.) presents many features in exact analogy to the litigation at bar. It was decided on Nov. 11, 1904, being in the month before the present case was commenced.

As recited on page 206:

> "The action was one in ejectment, brought by Oscar

> M. Yocum and John W. Yocum against J. W. Parker, Andrew B. Siler and Susan Siler to recover the possession of a tract of land in Platte County, Mo. Both plaintiffs and defendants claim title through George W. Yocum who died seized of the premises in 1854, leaving a will, the fifth paragraph of which contains all this material in this case. The paragraph, somewhat abridged, is as follows: 'To my beloved son, William Franklin Yocum, my natural son, I bequeath absolutely' a tract of land embracing that in controversy, 'with the express understanding and restriction, namely, that if my said son dies without legal issue, descendants of his, legitimate issue of his, said land shall pass to' certain collateral relatives, who were named. In 1858 William Franklin Yocum, the first taker under the will, conveyed the property by warranty deed to one Norris, and by mesne conveyances his title became vested in Susan Siler, one of the defendants, under whom the other defendants hold. William Franklin Yocum died in 1892. The plaintiffs are his sons, born in lawful wedlock, and are now his only surviving issue. In 1897 a prior action in ejectment between the same parties or their privies, and for the recovery of the possession of the same premises, was brought in a state court of Missouri. It resulted in a judgment for Susan Siler and her tenants, and the judgment was affirmed by the supreme court of Missouri. *Yocum vs. Siler*, 160 Mo., 281. Upon this state of facts the circuit court rendered judgment for the defendants."

Since the decision of the circuit court was affirmed and the opinion by Phillips, J., contains such a forceful statement of the matter, we quote therefrom as follows: *Yocum vs. Parker*, 130 Fed. 722, 724.

> "Looking to the trend of legislation on this subject in this state, beginning in 1825, touching estates tail, and the state statute respecting the rule to be observed in the construction of wills, and guided by plain, common, practical sense, we are to answer the question, what did the testator intend in devising this land to his natural son, William Franklin Yocum? Evidently he wanted him to have this land 'absolutely,' to do with as he pleased, subject to but one contingency—that of the birth of legitimate children.

* * * * * *

When such issue was born to the son the contingency on which the absolute estate was dependent occurred, and thereupon the estate in the son became complete in fee simple. Evidently, it seems to me, the testator had no other thought respecting the lineal heirs of the son than that their coming into existence should complete and seal the absolute estate of the son. He had no purpose to create in this 'beloved natural son' a mere life estate in the event of legitimate children born to him, with the remainder in such children. To hold otherwise, with all due respect, would cut to shreds, upon the sharp edge of legal technicalities, the wishes of the dead respecting the estate he desired the son, so near to his heart, to have when there should come into his life children, the offspring of lawful wedlock. Encouraging him against an example which perhaps had caused some anxiety in his own life, he made the absolute estate in the son to depend upon the birth of legitimate children. After the birth of such children, to limit the son's interests to a mere life estate would be to read out of the granting part of the devise the word 'absolutely,' and to import into the grant the customary apt words essential to the creation of an estate in remainder in the children."

Returning now to the decision of the circuit court of appeals, opinion by Hook, J., it is shown that certain sections of the Missouri statutes (Rev. St., Mo. 1845, c. 32, Sec. 5 and 6) were cited and considered. It was determined that section 5 had no application but that the other one had. Since it (Sec. 6) involves a principle of law as to a definite failure of issue clearly settled by a course of decisions in Ohio, another point of analogy between that case and the one at bar is apparent. The syllabus proceeds:

" * * * Section 6 provides that where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, 'the words "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor.' A will contained the following devise of land in Missouri: 'To my beloved son, * * * my natural son, I bequeath absolutely

(the land described), * * * with the express understanding and restriction, namely, that if my said son dies without legal issue, descendants of his, legitimate issue of his, said lands shall pass to other persons named. *Held*, that, contrued as required by said section 6 of the statute, such will vested the son with the estate in fee simple, subject to be divested on the happening of a contingency definite in point of time, to-wit, upon his death without living legitimate issue, and that, since under such construction an estate tail would in no event have been created, section 5 of the statute had no application.

* * * *

It is the settled rule that the courts of the United States will follow the decisions of the highest court of a state in the interpretation of the local statutes, and especially when they concern the descent and alieniation of lands and the construction of wills and conveyances, and where there is a conflict of decision on such a matter the federal court will follow the latest, when no intervening contract rights are involved."

The foregoing cases, we respectfully submit, refute the broad assertion of counsel for respondent that our authorities are not in point. Without quoting at length from other important decisions, cited and relied upon in our principal brief, (including among others the nearly parallel case of *Williamson vs. Tunis*, 107 Tenn., 83) we feel well warranted in saying that they fully sustain the several propositions in support of which they are cited and thereto we again respectfully refer the court.

The Tax Titles Were Valid.

The constitutionality of the tax legislation under which the Toledo property was sold and conveyed is, we respectfully submit, established by the following decisions of this honorable court:

Davidson vs. New Orleans, 96 U. S., 97-104.

Kelly vs. Pittsburgh, 104 U. S., 78.

Provident Institution vs. Jersey City, 113 U. S., 506.

Spencer vs. Merchant, 125 U. S., 345-352.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.
Weyerhausser vs. Minnesota, 176 U. S., 550, 556.
L. & N. R. R. Co. vs. Barber Asphalt Co., 197 U. S., 430-434.
Martin vs. District of Columbia, 205 U. S., 135.
Hunter vs. City of Pittsburgh, 207 U. S., 161.
Paddell vs. City of New York, 211 U. S., 446.
American Land Co. vs. Zeiss, 219 U. S., 47, 48.

In *Fallbrook Irrigation District vs. Bradley, supra*, a case involving the validity of certain California irrigation laws, the court, in the course of its opinion, at page 155, say:

> "We should not be justified in holding the act to be in violation of the state constitution in the face of clear and repeated decisions of the highest court of the state to the contrary, under the pretext that we were deciding principles of general constitutional law. If the act violate any provision, expressed or properly implied, of the federal constitution, it is our duty to so declare it; but if it do not, there is no justification for the federal courts to run counter to the decisions of the highest state court upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."

In *Hunter vs. City of Pittsburgh*, 207 U. S., 161, it was held:

> "The policy, wisdom, justice and fairness of a state statute, and its conformity to the state constitution are wholly for the legislature and the courts of

the state to determine, and with those matters this court has nothing to do."

In *Paddell vs. City of New York*, 211 U. S., 446, it was held:

"A constitution cannot be carried out with mathematical nicety to logical extremes.

"Long settled habits of the community play an important part in determining questions of constitutional law and the fact that a method of taxation was in force for many years from a time antedating the adoption of the fourteenth amendment is a reason for not considering that it was overthrown thereby."

In *American Land Co., vs. Zeiss, supra*, it was held:

"The fourteenth amendment does not operate to deprive the states of their lawful power; the due process clause of that amendment only restrains such exertions of power as are so unreasonable and unjust as to impair or destroy fundamental rights and, therefore, not really within lawful power of the state.

"This court in determining the constitutionality of a state statute is bound by the construction given to it by the highest court of the state, and will treat it as exacting whatever the state court has declared that it exacts either expressly or by implication.

"In determining the constitutionality of a state statute under the due process clause, the criterion is not whether any injury to an individual is possible, but whether the requirements as to notice and opportunity to protect property rights affected are just and reasonable.

"It being within the power of the state to determine how title to real estate shall be proved, it is also within the legislative competency of that state to establish the method of procedure."

Respectfully submitted,

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INDEX

PAGE

I. There is a Conflict of Decision between the Supreme Court of Ohio (Case No. 409, October Term, 1909, now Pending in this Court on Writ of Error to the Supreme Court of Ohio) and the Circuit Court of Appeals for Sixth Circuit, in Construction of Will Affecting Title to Valuable Real Estate..... 1

The Clear Weight of Authority is Against the Construction of the Will Adopted by the Circuit Court of Appeals..... 4

II. The First Final Judgment was in State Court and Closed Controversy..... 6

III. The Federal Courts Did Not Follow the Law of the State..... 6

IV. The Federal Courts Denied Full Faith and Credit to State Judgments and Decrees..... 7

V. The Law of the Case was Improperly Held to Avoid Defense of *Res Adjudicata*..... 12

VI. The Custody of the Property is in State Court... 15

VII. The Disregard by the Federal Courts of Ohio Statutes Defeated Petitioner's Right of Trial by Jury..... 15

VIII. The Circuit Court of Appeals Erred in its Construction of Contract of October 4, 1844, Affecting Title to Real Property..... 17

IX. The Petitioner's Record Title to Real Property was Destroyed by Incompetent Evidence..... 21

X. The Circuit Court of Appeals Erred in Reversing Second Judgment in Favor of Petitioner..... 21

In the Supreme Court of the United States

OCTOBER TERM, 1909

ROSEWELL E. MESSINGER,
Petitioner,
v.
PETER ANDERSON,
Respondent.

BRIEF IN BEHALF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The history of this case and a statement of the essential facts therein are set forth in the application for writ of *certiorari.*

I

CONFLICT OF DECISION BETWEEN STATE AND FEDERAL COURTS

There is a direct conflict of decision between the supreme court of Ohio and the circuit court of appeals for the sixth circuit, concerning the proper construction of the will of Henry Anderson, in suits between the same parties represented by the same counsel, asserting titles to real property involving the same questions of fact and law.

The state court held that respondent succeeded to no interest under this will. (*Anderson v. United Realty Co., Messinger et al.*, 79 O. S. 23).

This decision affirmed the judgment of the common pleas court of Lucas County, Ohio, rendered March 31, 1906, and of the circuit court of Lucas County, Ohio, rendered January 21, 1907 (19 Circuit Decisions, 267 — 29 Circuit Court Reports, 267), follows the established rule of property, the public policy and course of decision in Ohio, and reaffirms the set-

tled construction of section 5970 of the Revised Statutes of Ohio, adopted and in effect since 1840, same being as follows:

> "Every devise of lands, tenements or hereditaments in any will hereafter made, *shall* be construed to convey all the estate of the devisor therein, which he could lawfully devise, *unless it shall clearly appear by the will that the devisor intended to convey a less estate.*"

The circuit court of appeals for the sixth circuit held that under said will respondent took an estate in remainder, upon the decease of his father. (*Anderson v. Messinger*, 146 Fed. 929.)

We respectfully submit that this construction and said decision are wrong.

> Sec. 721 U. S. Revised Statutes.
> *Abbott v. Essex Co.*, 18 How. 202.
> *Niles v. Gray*, 12 O. S. 331, citing and following *Abbott v. Essex Co., supra*, and citing *Jordan v. Roach*, 32 Miss. 481.
> *Taylor v. Foster*, 17 O. S. 166.
> *Piatt v. Sinton*, 37 O. S. 353-355.
> *Martin v. Lapham*, 38 O. S. 538-541.
> *Collins v. Collins*, 40 O. S. 353.
> *Durfee v. MacNeil*, 58 O. S. 238-244.
> *Yocum v. Parker*, 134 Fed. 205 (C.C.A., 8th Cir.)
> *Devecmon v. Shaw*, 70 Md. 219-226.

Twelve out of the sixteen judges sitting in the different cases in which the Anderson will has been construed, have held in favor of petitioner's title. We respectfully submit that notwithstanding the exactly opposite opinion of the three honorable circuit judges of the sixth circuit, it cannot, in view of this conflict of decision, be said that "*it clearly appears*" from this will that the testator thereby intended to convey less than an estate in fee simple.

The case of *Roberts v. Lewis*, 153 U. S. 367, presents a situation closely analogous in principle to that raised for consideration upon the record in *Anderson v. Messinger*.

In a previous case between different parties, and as to different land, but *involving the construction of the same will*, the United States Supreme Court had decided that a *life estate only* was conveyed. *Giles v. Little*, 104 U. S. 291.

After that decision, suit was brought in the *state court* by several grantees of the so-called life tenant, or first taker, to quiet their titles, and the supreme court of Nebraska held that under the statute of the state, the will enabled the widow (the first taker), prior to her remarriage, to convey an estate in fee simple in any of the lands whereof her deceased husband had died seized. *Little v. Giles*, 25 Neb. 313.

The statute construed in this case is in substance and effect a copy of section 5970 of the Revised Statutes of Ohio, cited and quoted above.

The circuit court of appeals certified certain questions to the Supreme Court, and asked whether in determining the nature of the estate that vested under said will, the reviewing court should be governed by the former decision of the federal Supreme Court or by the subsequent decision of the state supreme court.

The Honorable the Supreme Court, on reconsideration of the whole matter, was of opinion that the circuit court of appeals in determining the nature of the estate which vested under said will, should be governed, not by the former decision of the United States Supreme Court, but by the decision of the supreme court of Nebraska (153 U. S. 367-379.)

The Clear Weight of Authority is Against the Construction of the Will Adopted by the Circuit Court of Appeals

The construction of the Anderson will by the circuit court of appeals (146 Fed. 929, 941) rests largely upon three cases which have been either discredited or overruled in the several states in which they arose, viz.:

Shaw v. Hoard, 18 O. S. 228.
Wetter v. United Hydraulic Cotton Press Co., 75 Ga. 540.
Carr v. Green, 2 McCord (S. C.) 75.

1. The rule in Ohio applicable to the Anderson will, certainly is not as declared in *Shaw v. Hoard*, but the opposite, as held by the supreme court in *Anderson v. United Realty Co.*, 79 O. S. 23, and cases therein cited and followed.

2. In Georgia, not as in *Wetter v. United Hydraulic Cotton Press Co.* but the opposite, as in *Matthews v. Hudson*, 81 Ga. 120-126; *Chewing v. Shumate*, 106 Ga. 751; *Hill v. Terrell*, 123 Ga. 49; *Kinard v. Hale*, 128 Ga. 485.

Mentioning many decisions in Georgia, the supreme court of that state in *Hill v. Terrell, supra*, on page 58 says:

> "In the harmony of these decisions there is but a single note of discord — *Wetter v. United Hydraulic Cotton Press Co.*, 75 Ga. 540."

3. As to the other case relied upon by the circuit court of appeals, *Carr v. Green, supra*, the same will is construed exactly the opposite way by a court of law (the decision quoted being by a court of equity) in *Carr v. Jeannerett*, 2 McCord (S. C.) 66, being the next preceding case in that same volume.

Other cases discrediting and in effect overruling *Carr v. Green* are:

Durant v. Nash, 30 S. C. 184 (1889).
Gordon v. Gordon, 32 S. C. 563 (1890).
Powers v. Bulkwinkle, 33 S. C. 293 (1890).
Thompson v. Peake, 38 S. C. 440 (1893).
Sheppard v. Jones, 77 S. C. 274, 279 (1907).

Said decision of the circuit court of appeals is also opposed to the decisions of the highest court of Mississippi, where

the testator resided when his will was drawn, executed and took effect.

Jordan v. Roach, 32 Miss. 481, 604 (construing will which took effect in 1847).
Sims v. Conger, 39 Miss. 231-233.
Busby v. Rhodes, 58 Miss. 237, 240.
Johnson v. DeLome, 77 Miss. 15, 26.
Halsey v. Gee, 79 Miss. 193 (1908).

Said decision of the circuit court of appeals is also contrary to the decisions of the highest courts of all the states comprising the territory over which the jurisdiction of that court extends in addition to Ohio, to wit: Kentucky, Tennessee and Michigan.

Crozier v. Cundall, 99 Ky. 202.
Smith v. Ballard, 117 Ky. 179.
Harvey v. Bell, 118 Ky. 512.
Rice v. Rice, 118 S. W. 270 (Ky. 1909).
Williamson v. Tunis, 107 Tenn. 83.
Mudreed v. Clark, 110 Mich. 229.

And it is contrary to the decisions of the highest courts of the following other states:

Newson v. Holcsapple, 101 Ala. 682.
Friedman v. Steiner, 107 Ill. 125.
Summers v. Smith, 127 Ill. 645.
Greer v. Wilson, 108 Ind. 322.
Hillcary v. Hillcary's Lessees, 26 Md. 274.
Hutchins v. Pearce, 80 Md 434.
Yocum v. Siler, 160 Mo. 281.
Gannon v. Pauk, 200 Mo. 75.
Woodman v. Madigar, 58 N. H. 6.
Stokes v. Weston, 142 N. Y. 433.
Washbon v. Cape, 144 N. Y. 287.
Colby v. Doty, 158 N. Y. 323.
Taylor v. Maris, 90 N. C. 619.
Trexler v. Holler, 107 N. C. 617
Barker's Appeal, 60 Pa. St. 141.
Redding v. Rice, 171 Pa. St. 301.
Atkinson v. McCormick, 76 Va. 791.
Randolph v. Wright, 81 Va. 608.
Johnson's Executors v. Citizens Bank, 83 Va. 63.
Randall v. Josselyn, 59 Vermont, 557, 563.
Chaplin v. Doty, 60 Vermont, 712.
Dent v. Pickens, 61 W. Va 488.

We respectfully submit that the gravity and importance of the questions concerning title to valuable real property, the review of which is sought by petitioner herein, and the fact that the case of *Anderson v. United Realty Co., Messinger et al.* (79 O. S. 23), involving the same questions of fact and law, is pending before this honorable court upon respondent's petition in error to the supreme court of Ohio, render it eminently proper that this honorable court should also entertain jurisdiction herein upon writ of *certiorari*, and thus ensure harmony of decision and the due preservation of the dignity of the state and federal courts.

II

FIRST FINAL JUDGMENT CONCLUSIVE

The first final judgment construing the will of Henry Anderson (affirmed, 79 O. S. 23, *supra*) was rendered by the state court March 31, 1906. This judgment was in favor of petitioner and closed the controversy.

Insurance Co. v. Harris, 97 U. S. 331-336.

III

FEDERAL COURTS MUST REGARD THE LAW OF THE STATE

The federal courts must look to the law of the state in which land is situated for the rules which govern its descent, alienation and transfer and for the effect and construction of wills and other instruments controlling title.

Brine v. Insurance Co., 96 U. S. 627-634.

DeVaughn v. Hutchinson, 165 U. S. 566-570.

Clarke v. Clarke, 178 U. S. 186-190.

Central Co. v. Central Mining Co., 204 U. S. 266-272.

Roberts v. Lewis, 153 U. S. 367.

IV

THE FEDERAL COURTS DENIED FULL FAITH AND CREDIT TO STATE JUDGMENTS AND DECREES

The circuit court and the circuit court of appeals each denied full faith and credit to the judgments and decrees of the courts of Ohio, in favor of your petitioner, duly pleaded and proved by him in the action in the federal court.

See Application for Writ of *Certiorari*, pp. 7-8.

Respondent voluntarily commenced his action in the state court and must abide the result. The judgments and decrees of the state courts were each final and *res adjudicata*.

Bryar v. Campbell, 177 U. S. 649, 657.

Forsyth v. Hammond, 166 U. S. 506.

Respondent should not, of course, be heard to collaterally deny the validity and conclusive effect of the judgment against him.

The requirement of the Constitution is that *full faith and credit shall be given* to judicial judgments and decrees.

U. S. Constitution, Art. IV, Sec. 1.
Sec. 905 U. S. Revised Statutes.
Haddock v. Haddock, 201 U. S. 562-567.

By the decree of the common pleas court rendered June 5, 1907, also duly pleaded and proved by your petitioner in the action in the federal court, the title of petitioner was duly and fully quieted against all claims and demands thereto on the part of respondent, and in default of conveyance thereby ordered to be made by him within three days, the decree operated as such conveyance.

Section 5318 of the Revised Statutes of Ohio, continuously in effect since February 19, 1810, gave this decree the same operation and effect and rendered it as available for petitioner's protection as if a conveyance had, on June 5, 1907, been duly executed and delivered by respondent to petitioner.

This statute was construed and approved by this honorable court in *Steele's Lessee v. Spencer*, 1 Peters, 552-557 (1827), and by the supreme court of Ohio in *Taylor v. Boyd*, 3 Ohio, 337, which held that a decree for conveyance without the execution of a deed in compliance therewith, transfers the title as if the deed had been executed. That this has become a rule of property in Ohio cannot be doubted.

Clearly the state courts in the foreclosure suits had complete jurisdiction of the parties and subject-matter, not only upon the several petitions of the United States Mortgage & Trust Company, but as well upon the several cross-petitions of your petitioner (section 5779 and sections 5067-5069 Revised Statutes of Ohio; *Southward v. Jamison*, 66 O. S. 290), and upon respondent's voluntary appeal to the state circuit court (*Mason v. Alexander*, 44 O. S. 318-330; *Foster v. Borne*, 63 O. S. 169-172; *Jenny, Admr., v. Walker*, 80 O. S. 153-154); and since this court has declared that the federal courts cannot, under such circumstances, reverse or set aside final judgments rendered by a state court, it is, we submit, clear that the circuit court and the circuit court of appeals, in disregarding and refusing to give effect to the final judgments and decrees of the state courts, invaded, impaired and defeated your petitioner's rights under the federal Constitution.

The honorable circuit court of appeals in some way overlooked the undisputed record evidence, establishing that the consolidated actions in foreclosure were heard by the circuit court of Lucas County, Ohio, March 9, 1908 (Record 281), and that a final decree as to part of the property was entered therein March 13, 1908 (Record 284), several months before the last trial of *Anderson v. Messinger* in the federal circuit court.

The court was clearly mistaken in stating in its last opinion that respondent's appeals in these suits were pending

in the supreme court of Ohio when *Anderson v. Messinger* was last heard in the circuit court (June 2, 1908). In our petition for rehearing in the circuit court of appeals, we respectfully directed the attention of the court to this inadvertence.

Under the Ohio practice (section 6710 Revised Statutes of Ohio), judgments or decrees rendered by the circuit court are not appealable to the supreme court, and are only reviewable thereby upon petition in error.

No other explanation is suggested by the honorable circuit court of appeals for denying effect to the last decree of the state circuit court, as the court distinctly recognizes the well established rule that it would make no difference that other land was involved, saying:

> "That different parcels were involved in the two cases would not be material; for if the parties were the same, and the subsequent case should turn upon the same question decided in the former case, under like conditions, that question could not be relitigated if relied upon as an estoppel."

And this is the well established rule.

Forsyth v. Hammond, 166 U. S. 506.
New Orleans v. Citizens Bank, 167 U. S. 371-396.
Southern Pacific v. United States, 168 U. S. 1-48.
Mitchell v. First National Bank, 180 U. S. 471-480.

With respect to the final decree of the common pleas court of Lucas County, Ohio, rendered June 5, 1907, it will be noted that under the Ohio practice, respondent's appeal therefrom only suspended its enforcement during the pendency of the appeal, but did not impair its validity or effect.

The statutes of Ohio relating to appeals provide:

> "When an appeal is taken, and bond given, the judgment is thereby suspended, unless some part of the final judgment appealed from be an injunction, in which case such injunction shall not be suspended, except by order of the circuit court, or two judges thereof, on reasonable notice to the adverse party: . . . . " Sec. 5235 R. S. O.

> "When the party against whom a judgment is rendered appeals his cause to the circuit court, the lien of the opposite party on the real estate of the appellant, created by the judgment, shall not be removed or vacated by the appeal; but the real estate of the appellant shall be bound, in the same manner as if the appeal had not been taken, until the final determination of the cause in the circuit court." Sec. 5236 R. S. O.

In the late case of *Jenny, Admr., v. Walker,* 80 O. S. 153-154, decided March 9, 1909, it was declared that the effect of an appeal is not to vacate and destroy the judgment appealed from, its only effect being to suspend such judgment, and to stay proceedings to enforce its execution. It does not operate to annul the judgment; or to otherwise impair its vitality and obligation than by merely suspending its enforcement during the pendency of the appeal. The lien, if any, created by the judgment is not removed or vacated by the appeal, but subsists and continues in the same manner and to the same extent as if the appeal had not been taken.

Your petitioner respectfully submits that under the decree of the common pleas court of June 5, 1907, his title was quieted to the premises in controversy until and unless said decree was set aside by decree or judgment of reversal by the state court in the same suit, and that the title evidenced by said decree was disregarded by the federal circuit court and the circuit court of appeals, in violation of your petitioner's constitutional rights.

Your petitioner further respectfully contends, upon the authority of *Mason v. Alexander,* 44 O. S. 318-330, and *Foster v. Borne,* 63 O. S. 169-172, that respondent by appealing from this decree to the state circuit court adopted these consolidated actions as his own, and is, of course, bound by everything thereafter done therein.

This principle is recognized and announced by the Honorable the Supreme Court of the United States in the late case of *T. P. Ry. Co. v. Easton*, decided May 17, 1909, 29 S. C. Rep. 564.

The disturbing and harmful result of the disregard by the federal courts of the state judgments and decrees is apparent. Upon the same title involving the same questions of fact and law, the state court has decided that a part of the square in controversy justly belongs to your petitioner and his codefendants, and by the decree of the state court the title of your petitioner to the premises the title to which is involved in the action in the federal court has been adjudicated in his favor and quieted against all claims and demands asserted thereto by respondent.

Notwithstanding these adjudications, the federal courts have sustained the claims of respondent to the premises involved in *Anderson v. Messinger*.

V

THE LAW OF THE CASE DID NOT IMPAIR DEFENSE OF *RES ADJUDICATA*

The law of the case did not require or sustain the action of the circuit court or of the circuit court of appeals in disregarding and refusing to give effect to the state judgments and decrees.

As stated, the first final judgment construing the will of Henry Anderson was rendered by the state court in an action at law March 31, 1906 (affirmed, 79 O. S. 23). The decree in the consolidated foreclosure suits was rendered by the common pleas court June 5, 1907, and related to all of the property in controversy in the action in the federal court and also to two adjacent parcels. The decree of the circuit court, on respondent's appeal thereto, was rendered as to part of said property March 13, 1908. This judgment and these decrees were in full force and effect and were duly pleaded and proved when *Anderson v. Messinger* was last tried at the June term, 1908, in the federal circuit court.

In discussing this question, the circuit court of appeals, in the course of its opinion, after stating that it has upon a second writ of error no power to modify or reexamine its former judgment as to the will of Henry Anderson, which it holds is not a question of *stare decisis* but one of *res adjudicata*, further says:

> "That the question arose in the court below under a plea of *res adjudicata*, does not alter the principle involved. To give effect to that defense required that court to disregard the mandate and adjudication of this court. If this court is to regard that defense, it will require us to reverse our own former decision. The way the matter came up is peculiar, but the rule which applies is not thereby abrogated."

We respectfully submit that this announcement of the law is contrary to the rule established by the late decision of

the Honorable the Supreme Court of the United States in *Chesapeake & Ohio Ry. Co. v. McCabe, Admx.*, 213 U. S. 207 (29 Sup. Court Rep. 430).

In this case the judgment of the court of appeals of Kentucky was reversed because that court upon a third appeal, believing itself bound by its former decisions in the same case as the law of the case, refused to give effect to a judgment of the circuit court of the United States between the same parties, with respect to the same subject-matter, entered after the second hearing in the state court of appeals and duly pleaded and, for the purpose of review, proved upon the last trial in the state circuit court.

If the law of the case as announced by the court of appeals of the state did not warrant the state court in denying effect to a federal judgment duly pleaded and proved, it is difficult to perceive upon what principle the circuit court of appeals was warranted in reaching an exactly opposite conclusion as to the effect of the state judgment and decrees duly pleaded and proved in *Messinger v. Anderson.*

Your petitioner contends that it is well settled law that when a cause is reversed and remanded by an appellate court generally, the judgment of the appellate court is not a final judgment and is never *res adjudicata* with respect to new issues and facts.

> *Aurora City v. West*, 74 U. S. 82-96.
> *Smith v. Adams*, 130 U. S. 167.
> *Eckert v. Binkley*, 134 Ind. 614-622.
> *Friedman v. Lesher*, 198 Ill. 21.
> *Blakeslee's Co. v. Ford*, 215 Ill. 230-233.
> *Trust Co. v Railway Co.*, 217 Ill. 504-506-507.

Petitioner respectfully submits that the last decision of the circuit court of appeals in *Messinger v. Anderson* is directly contrary to and disregards the rule announced by the Honorable the Supreme Court of the United States in *Aurora City v. West, supra*, as follows:

> " A reversal in a court of last resort, remanding a case, cannot be set up as a bar to a judgment in an inferior court in the same case."

The Honorable the Supreme Court of the United States, in the course of its opinion, at page 93 further says:

> " Unless a final judgment or decree is rendered in a suit, the proceedings in the same are never regarded as a bar to a subsequent action."

In this connection, we submit that the decision by the circuit court of appeals in *Anderson v. Messinger,* an action at law, in no respect limited or impaired the jurisdiction of the courts of Ohio in the equitable suits brought therein.

Foster v. Mora, 98 U. S. 425.
N. P. R. R. v. Paine, 119 U. S. 561.
Dwyer v. Garlough, 31 O. S. 158-160.

Although the circuit court of appeals in *Anderson v. Messinger* may have been limited, upon the second and third proceedings in error therein, to the consideration of errors committed after its first mandate, no such limitation applies to the Honorable the Supreme Court of the United States when, in the exercise of its supervisory powers, it grants a writ of *certiorari* to the circuit court of appeals, the entire case, of course, being thereby brought before this court for its examination and review; and to the end that justice may be done, and that petitioner's rights may not be defeated by any technical rules of practice we submit that this honorable court should review the proceedings of the lower courts.

Panama Co. v. Napier Co., 166 U. S. 280-284.

VI

CUSTODY OF PROPERTY IN STATE COURT

We respectfully submit that in any view of the case, since May 6, 1907, when judgment was entered in the foreclosure suits in the state court, and execution was issued and levied thereunder upon the premises in controversy, and duly returned, the custody of the entire property involved in the case at bar has been solely in the state court, and must be administered thereby (Record 287-288).

Freeman v. Howe, 24 How. 450.
Pulliam v. Osborne, Admr., 17 How. 471.
Heidritter v. Elizabeth Oil-Cloth Co., 112 U. S. 294, 305.

And a constructive levy is sufficient.

Southern Bank v. Folsom, 75 Fed. 929 (C. C. A., 6th Cir.).

VII

DISREGARD BY FEDERAL COURTS OF OHIO STATUTES DEFEATED PETITIONER'S RIGHT OF TRIAL BY JURY

The certified copy of the deed of Anderson's executors and trustees to Charles Butler dated October 9, 1855, and duly recorded May 2, 1860, was *prima facie* evidence of the execution and delivery thereof to Charles Butler at its date. The circuit court erred in refusing to consider or give effect thereto, and in refusing to submit this deed with other evidence to the jury; and the circuit court of appeals erred in affirming the action of the circuit court.

By section 4143 of the Revised Statutes of Ohio, continuously in effect since 1831 (29 O. L. 349; Swan's Ohio Statutes, p. 267; *Burnet v. Brush*, 6 Ohio, 32), it is provided:

> "A copy of the record of a deed . . . duly certified by the county recorder with his official seal affixed thereto, *shall* be received in all courts and places

within this state, as *prima facie* evidence of the existence of such instrument and as conclusive evidence of the existence of such record . . . ."

The supreme court of Ohio in *Lessee of Mitchell v. Ryan*, 3 O. S. 377-380 (opinion per Thurman, J.), says:

> " The decision of this case depends upon the question whether the recorded instrument, purporting to be a deed from Owen Shanon and wife to Ellen Shanon, was ever, in contemplation of law, delivered.
>
> " As the statute provides that copies from the records of deeds duly certified by the recorder, and under his official seal, ' shall be received in all courts and places within this state, as *prima facie* evidence of the existence of such deeds,' it is very clear that the record of a deed is *prima facie* evidence of its delivery, since, without delivery, it cannot exist as a deed. . . . the burden of proof that a recorded deed was not delivered rests upon the party attacking it."

All the authorities agree that a deed is presumed to have been delivered at its date.

> *Jones on Evidence*, Sec. 45, and numerous cases there cited.

> " Whenever evidence is offered to the jury which is in its nature *prima facie* or presumptive proof, its character as such ought not to be disregarded; and no court has a right to direct a jury to disregard it, or to view it under any different aspect from that in which it is actually presented. *Crane v. Morris et al.*, 6 Pet. 598."
>
> *Lilienthal's Tobacco v. United States*, 97 U. S. 237-268.

VIII

CIRCUIT COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF BUTLER-ANDERSON CONTRACT

The circuit court of appeals erred in the construction given by it to the contract between Henry Anderson and Charles Butler dated October 4, 1844. (*Anderson v. Messinger*, 146 Fed. 929, 931-935.)

The record evidence offered by respondent (Sec. 2, Stipulation No. 1, Record 50) establishes that Henry Anderson acquired his interest in Butler's Toledo property in trust. This cast upon respondent the burden of proving the termination and discharge of this trust by clear and satisfactory evidence. We respectfully submit that there was an entire failure of proof in this regard.

Seymour v. Freer, 75 U. S. 202-216.
Peugh v. Davis, 96 U. S. 332.
Handy v. Sibley, 46 O. S. 9-16.

We respectfully submit that by this contract the mortgaged property was expressly recognized as substituted for the mortgage, and thereafter as theretofore was held by Henry Anderson and his legal representatives in trust to secure Charles Butler's debt and subject to his right to redeem.

In construing this contract, the circuit court of appeals erred in declining to follow the authority of *Slee v. Manhattan*, 1 Paige (N. Y.) 48, and in holding same contrary to the decision in *Richards v. Holmes*, 18 How. 143, wherein the bill was filed by a subsequent encumbrancer, who alleged that the sale under a trust deed was void for the reason that the beneficiary of the trust could not bid at the trustee's sale, and that the first mortgage continued subject to redemption. In *Richards v. Holmes the purchaser was not trustee for the party who sought to redeem*, and the case clearly differs from

the cases of *Slee v. Manhattan* and *Anderson v. Messinger.*

We respectfully submit that this honorable court, by its decision in *Richards v. Holmes,* meant to make this distinction perfectly clear, by the following language used in the course of its opinion at page 148:

> "We do not deem it necessary to examine the numerous and somewhat conflicting decisions upon the subject of by-bidding, *or bidding by persons standing in fiduciary capacities. This case stands clear of those decisions and of the principles upon which they rest.*"

The circuit court of appeals must have overlooked and certainly disregarded the express affirmance and approval by the court of appeals of New York of the doctrine announced in *Slee v. Manhattan,* in a case entitled *In the Matter of the Estate of Edwin Gilbert, Deceased,* 104 N. Y. 200-209.

See also: *Brown v. Tyler,* 8 Gray, 135-139; *Stevens v. Dedham Savings Inst.,* 129 Mass. 547-549.

In *Villa v. Rodriguez,* 12 Wall. 323-339, this court declared that the law upon the subject of the right to redeem, where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled, saying:

> "It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and *that he paid for the property what it was worth.* He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instrument employed is immaterial. *That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence.*"

And in *Pough v. Davis*, 96 U. S. 332, this court declared that a subsequent release of an equity of redemption must appear by a writing importing in terms a transfer of the pledgor's interest, or such facts be shown as will estop him from asserting any interest in the premises, and that such release must be for an adequate consideration. Further, that in determining whether a transaction was intended to operate as such release, the value of the property, the fact that the pledgor retained possession and afterward improved and dealt with the property as his own, and any other like circumstances are strong evidence to show that a release was not intended.

We respectfully submit that the decision of the circuit court of appeals in *Anderson v. Messinger*, 146 Fed. 929, disregards and is in conflict with the principles announced in the foregoing decisions of the Honorable the Supreme Court of the United States, and also with the decisions of the courts of last resort of Ohio, New York, Massachusetts and other states.

The supreme court of Ohio in *Glidden v. Mechanics' Bank*, 53 O. S. 588, held that in the absence of express agreement authorizing it, a pledgee cannot become the purchaser of the pledged property at his own sale; and if the property be bid off by him the contract of pledge is not thereby terminated, nor the relations of the parties changed, unless the pledgor elects to treat the transaction as a valid sale, in which event the pledgee will be accountable for the net proceeds of the sale, the court, in the course of its opinion, at page 600 further saying:

> "If the sale had been ratified, the pledgor's right would have been to charge the bank with the price at which the property was so sold, and require the application of the proceeds, as of the date of the sale, toward the satisfaction of his debt and the charges against the property; and in that case he would have remained liable for the balance due on his debt."

In *Anderson v. Messinger,* no evidence whatever appears, showing that Mr. Butler ever received anything in cash, by way of credit or otherwise for his Toledo property, and by affimative and, we submit, undisputed evidence it appears that he paid his debt in full, with interest, without any deduction whatever for the property.

The honorable circuit court of appeals having in its first decision fallen into a mathematical error with respect to the payment of this debt, in each of its two subsequent decisions declared itself without power to relieve itself or the parties from the effect of this manifest mistake of fact. However this may be, the power of the Honorable the Supreme Court of the United States is not thus limited.

IX

PETITIONER'S RECORD TITLE DESTROYED BY INCOMPETENT EVIDENCE

Neither Messinger nor his grantor (a good faith purchased from Butler, who was owner of record) was shown to have had any knowledge or notice whatever of the contract between Butler and Anderson dated October 4, 1844, or of Butler's letters, or of other like evidence, all of which was clearly incompetent to sustain or destroy the record title to the premises in controversy.

> "The declarations of a party when in possession of land are, as against those claiming under him, competent evidence to show the character of his possession, and the title by which he held it, but not to sustain or destroy the record title."
>
> *Dodge v. Freedman's Sav. & Trust Co.*, 93 U. S. 379.

X

ERROR IN REVERSING SECOND JUDGMENT

Upon the second trial (Second Record No. 1679, original page 154) both parties asked a directed verdict, and upon the motion of petitioner a verdict was returned accordingly, and judgment entered thereon in his favor. This action of the trial court conclusively determined the facts in favor of your petitioner, and we respectfully submit that the circuit court of appeals, upon the second writ of error thereto, erred in reversing this judgment.

Beuttell v. Magone, 157 U. S. 154.

We respectfully submit that the record in this case presents questions of gravity and importance and an irreconcilable conflict of decision between the circuit court of appeals for the sixth circuit and the supreme and other Ohio courts. We further respectfully submit that the circuit court of

appeals has misconstrued the will under consideration, the Ohio statutes and decisions and has denied full faith and credit to the judgments and decrees of the state courts. An ancient title to valuable real property has been disturbed, and the public confidence thereby lessened in the official records and judicial proceedings relating to land titles. The injurious results are apparent and extend in many directions. The possibility of collision is certainly imminent between state and federal authorities in the discharge of their official duties with respect to the possession of the property affected, by directly opposite judgments. This situation can only be relieved by the decision of this honorable court.

Upon the authority of *Forsyth v. Hammond,* 166 U. S. 506, and *Panama Railroad v. Napier Co.,* 166 U. S. 280, the record presents a proper case for granting a writ of *certiorari.*

Respectfully submitted.

CLAYTON W. EVERETT,
OLIVER B. SNIDER,
HARRY E. KING,
Counsel for Petitioner.

Office Supreme Court, U. S.
FILED.
OCT 21 1909
JAMES H. McKENNEY,
Clerk.

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150

No. [redacted]

Supreme Court of the United States

ROSEWELL E. MESSINGER,

Petitioner

v.

PETER ANDERSON,

Respondent

Petition, Etc. for Writ of Certiorari
To the United States Circuit Court of Appeals
For the Sixth Circuit

CLAYTON W. EVERETT,
OLIVER E. SNIDER,
HARRY M. KING,

Counsel for Petitioner

INDEX

		PAGE
	Motion for Writ of Certiorari and Notice of Hearing	1-2
I.	History of the Case	3
II.	Statement of Issues and Proceedings	4
III.	Statement of Essential Facts	11
IV.	Statements Concerning Property Involved, and Plat	27
V.	Reasons for Granting Petition for Writ of Certiorari:	28
	1. Conflict of Decision Between the Supreme Court of Ohio (Case No. 409, October Term, 1908, now pending in this Court on Writ of Error to Supreme Court of Ohio) and Circuit Court of Appeals for Sixth Circuit, as to Construction of Will Affecting Title to Real Property	28
	2. Construction of Will by Federal Courts Disregarded Statute and Decisions of Ohio	30
	3. The Federal Courts Denied Full Faith and Credit to State Judgments and Decrees	30
	4. Custody of Property in State Court	36
	5. The Law of the Case was Improperly Held to Avoid Defense of *Res Adjudicata*	36

6. Disregard by Federal Courts of Ohio Statutes Defeated Petitioner's Right of Trial by Jury 37

7. Circuit Court of Appeals Erred in its Construction of Butler-Anderson Contract, Affecting Title to Real Property 38

8. Petitioner's Record Title to Real Property Destroyed by Incompetent Evidence 43

9. Record Conclusively Establishes by Written Evidence that Charles Butler Paid Indebtedness to Anderson Estate in Full, with Interest, to Secure Release and Discharge of Claim and Lien Against Toledo Property 44

10. Circuit Court of Appeals Disregarded Statutes and Decisions of Ohio Relative to Tax Title 44

11. Circuit Court of Appeals Erred in Reversing Second Judgment in Favor of Petitioner 45

12. Federal Courts Erred in Rendering Judgment Against Petitioner 45

VI. Prayer 46

The Supreme Court of the United States

OCTOBER TERM, 1909.

ROSEWELL E. MESSINGER,
Petitioner,
v.
PETER ANDERSON,
Respondent.

MOTION

Comes now Rosewell E. Messinger, by Harry E. King, one of his counsel, and moves this honorable court that it shall, by *certiorari* or other proper process directed to the honorable the judges of the United States circuit court of appeals for the sixth circuit, require said court to certify to this court, for its review and determination, the entire record in said court of certain proceedings in error therein to the circuit court for the western division of the northern district of Ohio, known in said circuit court of appeals as Nos. 1479 and 1679, respectively, each entitled *Peter Anderson, plaintiff in error, v. Rosewell E. Messinger, defendant in error,* and as No. 1916, entitled *Rosewell E. Messinger, plaintiff in error, v. Peter Anderson, defendant in error,* and to that end your petitioner now tenders herewith his petition and brief, with a certified copy of the record in said proceedings in error in said circuit court of appeals.

CLAYTON W. EVERETT,
OLIVER B. SNIDER,
HARRY E. KING,
Counsel.

In the United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT

ROSEWELL E. MESSENGER,
Plaintiff in Error,
v. No. 1916
PETER ANDERSON,
Defendant in Error.

NOTICE OF HEARING

Defendant in error is hereby notified that the plaintiff in error will, at the opening of the court, on Monday the first day of November, 1909, or as soon thereafter as counsel can be heard, upon his verified petition and a copy of the entire record in the above-entitled proceeding in error and in proceedings in error in said court known as Nos. 1479 and 1679, respectively, each entitled *Peter Anderson, plaintiff in error, v. Rosewell E. Messinger, defendant in error,* submit a motion to the Supreme Court of the United States in its court room at the Capitol in the City of Washington, D. C., a copy of which motion and of the petition for writ of *certiorari* and brief in support thereof are herewith delivered to you.

CLAYTON W. EVERETT,
OLIVER B. SNIDER,
HARRY E. KING,
Attorneys for Plaintiff in Error.

The foregoing notice is hereby accepted, and delivery is acknowledged to the undersigned of copy of said motion and of the petition for writ of *certiorari* and brief in support thereof.

October 20, 1909.

signed Rhea R Cary

Attorneys for Defendant in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1909

ROSEWELL E. MESSINGER,
Petitioner,
v.
PETER ANDERSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Rosewell E. Messinger, respectfully petitions this honorable court to grant a writ of *certiorari,* directing the circuit court of appeals for the sixth circuit to certify to this honorable court, for its review and determination, the entire record in said circuit court of appeals upon proceedings in error to the circuit court for the western division of the northern district of Ohio, known in said circuit court of appeals as Nos. 1479 and 1679, respectively, each entitled *Peter Anderson, plaintiff in error, v. Rosewell E. Messinger, defendant in error,* and as No. 1916 entitled *Rosewell E. Messinger, plaintiff in error, v. Peter Anderson, defendant in error,* and in support of this petition presents for the consideration of this honorable court the following:

I

HISTORY OF THE CASE

There have been three trials of this case in the circuit court, and it has been three times before the circuit court of appeals for the sixth circuit upon proceedings in error.

Except where otherwise noted, the references in this petition to pages of the record, are to the original numbers of the pages of the last record reviewed in the circuit court of appeals in proceeding in error therein No. 1916.

II

STATEMENT OF ISSUES AND PROCEEDINGS

December 27, 1904, respondent, Peter Anderson, a citizen and resident of Tennessee, brought an action at law, in ejectment, in the circuit court of the United States for the northern district of Ohio, western division, against petitioner, Rosewell E. Messinger, a citizen and resident of Ohio, wherein Anderson sought to recover from Messinger the possession and damages for the wrongful detention since September 16, 1902, of nearly half a block of valuable improved central real estate in the business section of the City of Toledo, Ohio (Record 2-3).

Respondent is the grandson and only living descendant of Henry Anderson, who died April 3, 1846, leaving a will under which respondent claims the property in controversy.

Issue was duly joined, and at the June term, 1905, the case was first tried in the circuit court before Hon. Robert W. Tayler, a jury being waived, and resulted in a judgment in favor of Messinger.

July 25, 1905, respondent, by the same attorneys, brought another action in ejectment, No. 53924, in the common pleas court of Lucas County, Ohio, against the petitioner and others, to recover the remaining part of the same block of property and other property in Toledo, respondent basing his claim on the same will.

This action was entitled *Anderson v. United Realty Co., Messinger et al.*, and involved the same questions of fact and law as were involved in the action in the federal court. After trial on the merits, judgment was rendered therein March 31, 1906, in favor of defendants, including your petitioner. On proceedings in error by respondent, this judgment was affirmed by the Lucas County circuit court January 25, 1907 (19 Circuit Decisions, 267—29 Ohio Circuit Court Rep. 267), and by the supreme court of Ohio, November 10, 1908 (79

O. S. 23). On writ of error No. 409, October term, 1908, sued out by respondent, this judgment is now before this honorable court for review.

In the case in the federal circuit court, respondent sued out a writ of error to the circuit court of appeals, and on June 5, 1906, the judgment of the circuit court was reversed, and the case was remanded for a new trial (146 Fed. 929). At said date, the circuit court of appeals filed its opinion in said proceeding in error, a copy whereof accompanies and forms part of the certified copy of the record and proceedings in said court beginning at page 84 thereof.

At the December term, 1906, the case was again tried in the federal circuit court upon the same pleadings, before Hon. Robert W. Tayler, judge, and a jury. At the conclusion of all the evidence, respondent and petitioner each moved the court to instruct the jury to render a verdict. The court overruled respondent's motion and granted that of your petitioner, and a verdict was accordingly rendered in favor of petitioner, and judgment was entered thereon.

October 25, 1906, the United States Mortgage & Trust Company commenced two actions in the common pleas court of Lucas County, Ohio, to foreclose two mortgages for $45,000 and $18,000 and interest, given this company by your petitioner and wife in 1897 and 1903, respectively, on the entire property, except lot 33, shown on plat opposite page 27, of this petition, joining as defendants to each action your petitioner, his wife, respondent and other parties (Record 151-155, 203-207). November 15, 1906, your petitioner filed an answer and cross-petition in each of these actions, making respondent and others parties defendant thereto, with prayer that petitioner's title to said premises be quieted and for all proper equitable relief; and thereupon separate summons was duly issued on respondent and said other parties (Record 158-165,

211-217). Thereafter, respondent voluntarily appeared in each of these suits and duly obtained general leave to answer, and thereafter pleaded therein (Record 169-217).

The issues were duly joined therein (see your petitioner's amended and supplemental answers and cross-petitions therein, Record 181-190; respondent's answers thereto, Record 191-197, 243-249; and your petitioner's replies thereto, Record 197-201, 250-253). These cases were then consolidated by consent and were duly heard by the court of common pleas on the pleadings and the evidence (Record 254) and on June 5, 1907, final decrees were duly entered in said consolidated suits in favor of the first and second mortgagees, respectively, and in favor of your petitioner, and against respondent (Record 258-267).

Upon all the issues joined therein between your petitioner and respondent, said court found that the equities were with your petitioner, and that respondent had no claim, right, title, estate or interest in the mortgaged premises; that Henry Anderson, under whom respondent claims, held title thereto in trust for Charles Butler, as security for a debt; that Butler paid said debt in full, and that the representatives of Anderson's estate had duly released and discharged same; that your petitioner was entitled to a proper deed of release and quit-claim from respondent, which he was ordered to execute and deliver within three days; and that in default thereof, the decree of the court should operate as such conveyance, the title of your petitioner to said premises by said decree being duly quieted, and respondent barred and forever enjoined from setting up, asserting or claiming any interest, right, title or estate therein or thereto (Record 259-260).

On May 6, 1907, an execution was duly issued in said consolidated suits by the court of common pleas of Lucas County, Ohio, to the sheriff of said county, and was on the same day duly levied upon all of the property in controversy (Record 287-288).

Respondent appealed from this decree to the Lucas County, Ohio, circuit court, where these consolidated suits were duly heard at the January term, 1908; and on April 4, 1908, final decree was entered therein as to part of the premises in controversy (Record 284-287).

In the case in the federal circuit court, respondent sued out a second writ of error to the circuit court of appeals, and on December 17, 1907, the judgment of the circuit court was reversed, and the case again remanded for a new trial (158 Fed. 250). At said date, the circuit court of appeals filed its opinion in said proceeding in error, a copy whereof accompanies and forms part of the certified copy of the record and proceedings in said court beginning on page 172 thereof.

Your petitioner then duly obtained leave from the federal circuit court to file and duly filed an amended and supplemental answer (Record 4-26), setting forth therein three defenses:

1st. A general denial.

2d. *Res adjudicata* and estoppel, by reason of final judgment of the common pleas court of Lucas County, Ohio, *rendered March 31, 1906*, in case No. 53,924 therein, entitled *Anderson v. United Realty Co., Messinger et al.*

3d. Estoppel and bar, by reason of the findings and final decree of the common pleas court of Lucas County, Ohio, rendered June 5, 1907, in Nos. 55,794 and 55,795 in said court, entitled *United States Mortgage & Trust Co. v. Anderson, Messinger et al.*, and *United States Mortgage & Trust Co. v. Messinger, Anderson et al.* (Record 4-26).

Thereafter, your petitioner duly obtained leave to file, and filed a supplement to the third defense of his amended and supplemental answer (Record 41, 33-38), setting forth the proceedings upon Anderson's appeal to the circuit court of Lucas County, Ohio, in the consolidated foreclosure suits (Record

33-38), and respondent, in due course, filed replies to your petitioner's amended and supplemental pleadings (Record 27-28-39).

On June 2, 1908, the first day of the term, your petitioner duly made application in writing to the federal circuit court for an order staying further proceedings in the case until there had been a final decision by the supreme court of the State of Ohio in one or both of the actions in the state court. This application was heard upon evidence, and was overruled, to which ruling your petitioner duly excepted, and took bill of exceptions with respect thereto (Record 41-47).

Thereupon, the third trial in the circuit court was had before Hon. Robert W. Tayler and a jury; and at the conclusion of all the evidence, on motion by respondent, the court, against objection and exception thereto by your petitioner, directed the jury to return a verdict in favor of respondent, finding him entitled to the possession of the property described in the petition and assessing his damages for the wrongful withholding of possession of said property at $46,904, which verdict was returned accordingly, and judgment was thereupon entered thereon (Record 41-42).

A transcript of the entire record in *Anderson v. United Realty Co., Messinger et al.*, including bill of exceptions therein (Record 65-150), and a transcript of the entire record in the Lucas County, Ohio, common pleas and circuit courts in the consolidated foreclosure suits, entitled *United States Mortgage & Trust Co. v. Anderson, Messinger et al.* (Record 150-289), were each duly offered and received in evidence upon said last trial.

On November 10, 1908, the supreme court of Ohio rendered its decision in the proceeding in error prosecuted thereto by respondent, affirming the judgment of the lower courts in *Anderson v. United Realty Co., Messinger et al.* (79 O. S. 23).

Thereupon, *within the June term, 1908,* your petitioner duly made an application to the federal circuit court for an order vacating and setting aside the judgment rendered in the action of ejectment in said court and for a new trial, basing said application upon the decision of the supreme court of Ohio, during the same term.

November 30, 1908, and within the June term, this application was duly heard upon evidence and denied, exception was entered, and bill of exceptions taken (Record 347-353).

Respondent also took a bill of exceptions setting forth the proceedings in the federal circuit court, and after duly moving for a new trial, and after determination of proceedings under the statutes of Ohio for the benefit of occupying claimants of real estate, on November 30, 1908, sued out a writ of error to reverse the judgment of said court (Record 45-47 *et seq.*).

This was heard before the circuit court of appeals May 4, 1909, and on June 8, 1909, the court affirmed the last judgment of the circuit court.

June 17, 1909, the circuit court of appeals filed its opinion in said proceeding in error. A copy thereof accompanies and forms part of the certified copy of the record and proceedings in said circuit court of appeals, beginning therein directly after last record (No. 1916).

July 15, 1909, your petitioner filed a petition for rehearing in said circuit court of appeals. This was denied by said court October 11, 1909, and on the same day your petitioner duly made application to said court to stay its mandate and proceedings under its judgment of affirmance herein for such reasonable time as to said court might seem necessary to allow petitioner to duly apply to the Honorable the Supreme Court of the United States for a writ of *certiorari* to review the said judgment and proceedings, and duly filed stipulation of the parties providing for such stay, which application was

on the same day granted and the mandate of said court was ordered stayed for thirty days. A copy of said petition for rehearing, application for stay, stipulation and the action of said court thereon, respectively, accompany and form part of the record and proceedings of said circuit court of appeals, beginning therein directly after the last opinion of said court (Record No. 1916).

A duly certified copy of the entire record of said case in said circuit court of appeals under said several numbers 1479, 1679 and 1916, is herewith furnished and made part of this petition in conformity with the practice and rules of this honorable court relative to cases from circuit courts of appeals, same being marked " Exhibit A " hereof.

Your petitioner is advised and believes that the said judgment of the said United States circuit court of appeals in said case is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the act of Congress, entitled " An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the said case being made final in the said circuit court of appeals by the said act, the opposite parties thereto being citizens of different states.

III

STATEMENT OF ESSENTIAL FACTS

Your petitioner respectfully represents to this honorable court that the essential facts in the case of *Anderson v. Messinger* shown by the record submitted herewith, are substantially undisputed and are in substance as follows:

Your petitioner and respondent each derives his title from Edward Bissell, who in 1838 owned the premises the title to which is in controversy between petitioner and respondent in the several actions in the federal and state courts.

May 19, 1838, Edward Bissell gave his bond to Charles Butler, of New York, for $21,500, payable one year after date with interest, and duly secured the payment thereof to Butler by a mortgage on said and other Toledo property, which mortgage was duly recorded.

July 1, 1841, Henry Anderson, then a resident of Holly Springs, Mississippi, loaned $20,000 to Charles Butler, then a resident of New York City, *upon the unsecured note* of Butler, payable one day after date with interest.

At least as early as September 21, 1841, Charles Butler and Henry Anderson had become mutually interested in certain transactions with the American Land Company, whereby they were each to be paid, and agreed to equally divide, certain commissions as same might accrue to them from said company for warranting the title to certain western land.

September 23, 1841, Charles Butler assigned the Bissell bond and mortgage to Henry Anderson in trust, as collateral security for the payment of Butler's note dated July 1, 1841, for $20,000, which assignment was on September 30, 1841, duly recorded on the margin of the public record of the Bissell mortgage, same being (Record 50) as follows:

> "Assignment: I hereby assign this mortgage to Henry Anderson on certain trusts set forth in a deed this day made. September 23, 1841.
>
> "Charles Butler."

As further security, Butler also assigned to Anderson 546 shares of the stock of the Erie & Kalamazoo Railroad Company, of the par value of $50 each.

By deed dated February 22, 1843, recorded October 11, 1849, Edward Bissell and wife conveyed the entire property covered by this mortgage to Charles Butler, who, after the date of said deed, was continuously in possession and control of said premises and paid all of the taxes and assessments thereon until a sale was made by Butler to Calvin Bronson during the early part of 1860.

September 19, 1843, Henry Anderson, as the assignee of the Bissell mortgage, filed a bill in chancery in the court of common pleas of Lucas County, Ohio, against Edward Bissell and others to foreclose said mortgage.

Charles Butler, although named as a defendant, was not served with subpoena or other process, and in no manner entered his appearance in this action, and the court acquired no jurisdiction therein over him, and in the bill no allegations were made against him (Record 51).

April 1, 1844, a decree was entered in this action ordering the premises to be advertised and sold according to law for the payment of $29,139.01 found due Anderson on the Bissell bond and mortgage, and Edson Allen was appointed master commissioner in chancery to make said sale.

September 24, 1844, the mortgaged property was sold by the master commissioner to Henry Anderson for $6,921, being more than two-thirds of the appraised value thereof (Record 52).

Prior to October 4, 1844, this sale was duly reported to and confirmed by the court, and a deed was ordered made in accordance therewith (Record 52).

October 4, 1844, Anderson and Butler entered into a written agreement, wherein it was recited:

That Butler had assigned the Bissell bond and mortgage

to Anderson as collateral security for the payment of $20,000 note theretofore given by Butler to Anderson;

That proceedings in relation to the Bissell bond had been taken by Anderson, and that an order for sale of the mortgaged premises had been made and confirmed;

That a decree or judgment for deficiency might be obtained in favor of Anderson against Bissell;

That Butler as further collateral security for the payment of his $20,000 note in favor of Anderson, had also assigned to Anderson certain shares of railroad stock of the par value of $27,300;

That Anderson, at the request of Butler and in consideration of the covenant of Butler in said agreement contained, was willing to relinquish and surrender to Butler *the* collateral securities so assigned as aforesaid for the payment of said note of $20,000, so far as same might be done without prejudice or injury to the order obtained for sale of said premises and the rights of Anderson under the same, and without prejudice to the personal liability of Butler to Anderson on the principal debt.

The contract then provides as follows:

In consideration of the premises and for the purpose of giving effect to the same, Anderson has at this date executed and delivered a power of attorney to Butler, authorizing him if he sees fit to do so, to release and discharge Bissell from all personal claims on said bond and mortgage, but without prejudice to the proceedings which have been or may be adopted to effect the sale of said mortgaged premises; and that Anderson has also, in writing, released and transferred to Butler the shares of railroad stock.

Butler, in consideration of the surrender and relinquishment of the said securities, covenants and agrees with Anderson that the same shall not be held or construed in any way to affect or impair the liability of Butler on said note for

$20,000; and Butler also covenants and agrees with Anderson that he, Butler, will apply and pay over to Anderson on account of said note any money or other consideration which he, Butler, may receive or derive by reason of the surrender and relinquishment of the securities aforesaid by Anderson (Record 322-323).

December 24, 1844, by deed dated November 18, 1844, Edson Allen, master commissioner, conveyed to Anderson such title to said mortgaged property as said Anderson was capable of acquiring; recorded December 27, 1844 (Record 52).

The record discloses no evidence showing or tending to show any knowledge or notice whatsoever by purchasers from Butler or of those claiming under such purchasers, of the agreement of October 4, 1844, between Anderson and Butler; and petitioner contends that he was and is in no respect bound thereby, and further contends that the title acquired by him could be in nowise thereby affected.

As above stated, Henry Anderson died April 3, 1846, a resident of Mississippi, leaving a will, a copy of which appears in the record at pages 54 to 59.

The following is an abstract of the essential provisions of this will:

> *"I give, devise and bequeath to Peter Anderson, Walter Goodman and Peter W. Lucas, all my property, both real and personal, legal and equitable,* in possession, reversion or remainder, and all claims and demands whatsoever, except such right, title or claim to land, money or choses in action as I may be entitled to as one of the agents of the American Land Company and as one of the stockholders of said company. This property they shall hold in trust, and if one or more of them die, the survivors or survivor shall hold in trust for the following purposes:
>
> "They shall pay my debts other than such as may be owing to the American Land Company, *out of moneys on hand and such property as may be sold least injurious to my estate.* I wish them to collect

debts due to me and apply to this purpose. They may, if they think fit, and can, obtain an extension of time on any debt, and they may pledge my property to raise money to pay debts. They may sell for cash, or on credit, and if at any time they have funds on hand not required for debts or legacies, they may invest the same.

"*They shall have full power to make titles for property sold* and to pay charges for preservation, *and in all respects have the power of owners,* but always as trustees.

"I have entire confidence in each of them, and therefore *I give each the power of all,* so that each may do separately what all acting together may do, except in making investments; in that I wish all to join.

"The annual accounts of my said trustees signed by their respective names shall be binding on my heirs and shall be conclusively so, unless error or fraud be clearly established.

"I have directed the payment of debts, other than what I may owe the American Land Company.

"I exclude the debts of the company because that is subject to an account with the company, and I do not wish my trustees to make payments before that account is adjusted. The adjustment of that account and the direction and management of the affairs of the company so far as I have power, right or interest, I place in the hands of Peter Anderson and Walter Goodman, and when they have finally closed it, it shall become a part of the trust created by this article of my will and subject to the control of my said trustees. By saying 'It shall become a part of the trust,' I mean the *effects and proceeds* that I may be entitled to as stockholder and agent of the company."

Then follow certain provisions with respect to the settlement directed to be concluded by Peter Anderson and Walter Goodman, as trustees, of certain unadjusted transactions and accounts between the testator and the American Land Company.

"It is my will that when my son William arrives at the age of twenty-one years, the trustees of the first and general trust shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid,

and as soon as that takes place, *they shall put him in possession of one-half* of my property, reserving thereout two-fifths of said moiety, by valuation, which my said trustees shall hold in trust and properly invest and *pay over to him at the age of twenty-five years.* If my interest in the American Land Company be not brought into the general trust at the time William becomes twenty-one, but is brought in any time before he arrives at twenty-five, so soon as brought in two-fifths shall be deducted therefrom, and invested and *paid over to him at twenty-five;* the other three-fifths *he shall have as soon as paid in.* I find the above does not express my will in this: when I say two-fifths shall be deducted from the interest I may have in the land company for investment, and three-fifths to be paid to him, I mean two-fifths of a moiety shall be deducted and three-fifths of a moiety paid over.

"It is my will that said trustees hold and invest *and pay over* the remaining moiety of my estate *to my son James at the respective periods of twenty-one and twenty-five years of age,* being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the regulations laid down concerning the same.

"If either of my sons die without lineal descendants the one surviving *shall take his estate above bequeathed,* and if survivor die without lineal descendants then one-half both of the decedent's original portion as well as one-half of the portion taken by survivorship shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother Peter be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving, then the share shall go to my other brothers and sisters surviving at the time of such decease of my son. I make the following explanation: The limitations over on the death of my surviving son without lineal descendants is intended to take effect, if there be no lineal descendants living, at the time of the decease of such son. *Nothing in the foregoing will shall be construed*

as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years respectively. The above limitations over shall give way to the provisions of such wills.

"I entered into a contract with the American Land Company to warrantee title to such lands of the company as might be sold, and it so is that many title bonds are now out binding me to such warrantees. I give to Peter Anderson and Walter Goodman or either of them, the power to execute deeds to carry out such warrantees, and I declare that the name of either with the seal of either to such deeds shall bind my heirs, executors and administrators. It is also the case that I hold lands in common with Daniel Saffarrans. It is important that these lands be sold as purchasers may offer. My undivided half interest has already by this my will been devised to my general trustees. I declare that they or either of them shall have the power to convey with warrantee. This power I presume they have by the first clause of my will, which vests the title in them. I only mention it here for greater certainty."

Certain bequests are then made to Peter Anderson, testator's brother; a bequest of one thousand dollars to testator's niece, Caroline; and a bequest of two thousand dollars to testator's niece, Rucellea.

"I have directed that a portion of my property shall be placed in the hands of my sons on their arriving at twenty-one, and I have directed that my trustees shall have the power to procure extension of my debts, and I have made the payment to my sons dependent on the payment of my debts. Now, on reconsideration it occurs to me that it may so happen that there will be outstanding and unadjusted accounts at the time my sons arrive at twenty-one, and yet it might be in nowise injurious or improper *to place my sons in possession of a part of what may be coming to them.* My trustees are therefore authorized, if they think fit, *to let them have a portion of what is coming to them at twenty-one,* even though some debts may remain unpaid. The amount of such portion shall be according to the discretion of my trustees. It shall not exceed the amount that is limited to them on the payment of debts, nor ought it to be an amount that would jeopardize their payment."

Then follow certain provisions with respect to the payment of interest on legacies under certain conditions, etc.

And a bequest is then made to testator's son William of a diamond ring, and to his son James of a certain watch.

Henry Anderson left surviving him two sons, his only heirs at law:

William Anderson, born February 12, 1828.

James H. Anderson, born June 25, 1831.

William Anderson died intestate during January, 1850, unmarried and without issue.

James H. Anderson died intestate September 16, 1902, leaving surviving him his only child and heir at law, the plaintiff below, Peter Anderson, who was born August 27, 1859, and who is the grandson and only grandchild and only living descendant of Henry Anderson, deceased.

It therefore appears that William Anderson became twenty-one years of age February 12, 1849; and that James H. Anderson became twenty-one years of age June 25, 1852, and therefore attained his twenty-fifth year June 25, 1856 (Record 60-61).

Charles Butler died December 13, 1897.

Mr. Butler and Mr. Anderson were capable and experienced men of affairs, and so far as appears, the relations between them were always friendly.

The first transaction between them shown by the record was the loaning by Anderson to Butler on July 1, 1841, of the large sum of $20,000 upon Butler's unsecured note.

The next was an agreement between them on September 21, 1841, providing for the investment by Anderson or his representatives for fifteen years, of certain commissions in which Anderson and Butler were equally interested, the net amount of which in 1848 was about $12,000.

And the last transaction between these gentlemen, shown by the record, was the contract of October 4, 1844.

Shortly after the death of Mr. Anderson in 1846, his will was duly probated before the probate court of Marshall County, Mississippi, and Walter Goodman, Peter Anderson and Peter W. Lucas duly qualified as executors and trustees thereunder and entered upon the discharge of their duties (Record 54-59).

April 20, 1860, fourteen years after probate in Mississippi, Henry Anderson's will was filed and admitted to probate and record in the probate court of Lucas County, Ohio (Record 294).

After the appointment of the executors and trustees, they made and returned to the probate court of Marshall County, Mississippi, an inventory of the personal assets of the estate of Henry Anderson, deceased, and included therein the note given by Charles Butler to Henry Anderson July 1, 1841, for $20,000 (Record 295-296).

The fact that Anderson held the Bissell property, including the premises in controversy herein, in trust to secure a debt from Butler, was fully investigated, and as early as October 10, 1849, a distinct understanding to this effect was reached between Anderson's sons and his executors and trustees and Mr. Butler; and it is important to note that it was at this date that Butler made his first payment in cash to the executors on account of his indebtedness (Record 295-332).

Upon the last trial in the circuit court, Anderson produced from the custodian of the papers of the estate of Charles Butler, deceased, and offered in evidence the following instruments:

1st. An unrecorded contract (Record 376) between Charles Butler and William Anderson dated October 10, 1849, wherein it is recited that Henry Anderson held the title to the premises acquired in foreclosure by master's deed, in trust to secure Butler's note dated in July, 1841, for $20,000 and interest, and William Anderson, as heir at law of Henry

Anderson, declared that he held said property in trust as security for the payment of the same indebtedness and agreed on the payment thereof to execute and redeliver to Gharles Butler, his heirs or assigns, a full and complete release of his title to all of said premises, Butler therein agreeing to pay said note to the executors of Henry Anderson with interest, at dates and in amounts therein specified, and that he would also pay all taxes and assessments on said premises. It was further agreed that the amount due Butler from the Anderson estate under contract for commissions for warranting title to lands sold for the American Land Company, should be applied upon the payment of said note.

2d. A written instrument dated September 16, 1851, duly executed and delivered to Charles Butler by James H. Anderson in the presence of W. Goodman and P. Anderson (two of the executors and trustees) and S. H. Fleetwood, and duly acknowledged before the latter as a commissioner for the State of New York, which recited the same facts and evidenced substantially the same agreement as did the above-mentioned contract between William Anderson and Charles Butler (Record 335-337).

3d. Also an unrecorded written agreement between James H. Anderson and Charles Butler supplemental to and endorsed on the foregoing agreement of September 16, 1851, duly executed, sealed, delivered and acknowledged October 1, 1852, wherein it was provided that the payment of said indebtedness by said Butler to said executors should be extended as follows:

October 1, 1852.....$2,500,
October 1, 1853..... 4,000,
October 1, 1854..... 4,000,
October 1, 1855..... 4,000,
October 1, 1856..... the balance.

All said payments to be made with interest at six per cent., to be paid annually on October 1st in each year (Record 335-337).

By October 30, 1855, and in any view of this case within the life of the trust created by Anderson's will, Butler made the following payments to Anderson's executors:

Prior to Oct. 1, 1852 (Record 295)	$17,830.04	
Oct. 1, 1852 (Record 295)	1,669.96	
Oct. 1, 1853 (Note, Record 296)	7,340.00	
Paid as per 9th report (Record 296)	3,000.00	
Paid as per 10th report (Record 296)	4,340.00	
Paid as per 10th report (Record 296)	1,027.60	
Total		$35,207.60
Face of note July 1, 1841	$20,000.00	
Interest to Oct. 1, 1852, 11 yrs. 3 mos.	$13,500.00	
Interest to Oct. 30, 1855	1,703.57	
Total interest	15,203.37	
Amount principal and interest	$35,203.37	
Amount overpaid	4.23	
Total		$35,207.60

And for convenience, it is here noted that after October, 1855, Butler paid to the executors and James H. Anderson in cash:

The above note	$7,340.00
And 7% interest thereon	3,793.19
Amounting to	$11,133.19

As follows:

Jan. 1, 1857 (Record 343)	$4,000.00
May 7, 1860 (Record 343)	2,041.00
Aug. 9, 1860 (Record 343)	500.00
Feb. 1, 1861 (Record 343)	2,419.49
March 8, 1861 (Record 343)	2,172.70
Total	$11,133.19

Each and all of said payments are admitted by stipulation or proved by undisputed written evidence (Record 295-296, 343).

Some time in October, 1855, Peter Anderson and Walter Goodman, two of the executors and trustees under the will of Henry Anderson, deceased, duly executed a deed conveying to Charles Butler all of the real estate described in the Bissell mortgage, including all of the premises in controversy in this action, and shortly after the making of this deed, it was placed by the executors and trustees in the hands of Mr. Halstead, then the president of the Bank of the Manhattan Company, in New York City, with instructions, it is submitted, to deliver same to Charles Butler upon the payment by him of the balance due upon his note for $20,000 above described. Mr. Halstead died some years ago (Record 319).

Thereafter the executors and trustees made a settlement of their trust with James H. Anderson, the only surviving son and heir of Henry Anderson, and turned over to him all of the estate in their hands belonging to him; and unquestionably also assigned and delivered to him the note dated October 1, 1853, for $7,340 above mentioned. In any event, they directed Mr. Halstead and the Bank of the Manhattan Company to turn over to James H. Anderson any payments which might thereafter be made to the bank by Butler upon his note, and any payments thereafter made by Butler were turned over to James H. Anderson.

Upon the last trial in the circuit court, Anderson also produced from the custodian of the papers of the estate of Charles Butler, deceased, and offered in evidence copies of two letters, one being a letter from Mr. Butler to James H. Anderson, dated July 28, 1858 (Record 338-340), wherein Mr. Butler expresses the hope of being able to dispose of a part of his property so as to provide for payment to James H. Anderson of the balance due him, and among other things, therein says:

> "There are about $2,000 of taxes and assessments against the property, overdue since last fall, which it has been utterly out of my power to provide for. There was no way under the sun that I could command the means. . . . If it should meet your views to take the property at a *bona fide* valuation in payment of the debt it would be a great relief to me, and from such valuation would make a liberal deduction. I have struggled to hold on to this property for many years in the hope of realizing from it some part of the large sum it has cost me, and for the first time in many years it looks to me as the time is approaching when it would be in demand at prices that would pay off the incumbrance and yield a handsome surplus. . . . I have explained all this to Mr. Goodman, who is now here. I regret most sincerely the turn things have taken with me within the last year and most of all because it interfered with and defeated the provision and arrangements which I had made for the pay-

ment of this debt in full prior to the 1st January last. But the catastrophe which happened and which put all in the world I had in jeopardy was not foreseen, and could not be prevented."

The other of said letters is as follows:

"No. 12 Wall street,
New York, 19th March, 1860.

"W. GOODMAN, ESQ., Holly Springs, Miss.

"My dear sir: I have just been to the Manhattan Bank to see if I could find the deed deposited there by you on the 9th October, 1855, of the Toledo property and found it all safe. It was left with Mr. Allaire, the first teller, and the envelope has the endorsement 'The property of Walter Goodman, Peter Anderson, and to be delivered on the order of either of them.' My contract with Mr. Bronson for the sale of the property is very stringent and requires me to make a title to the property with certificate of Mr. Waite that the title is free and clear and valid and to have the deed, with the certificate of title, at Toledo by the first of May. I am apprehensive that Mr. Bronson will avail of any possible chance of backing out from this contract with me. He is a perfectly responsible man, and once bound will pay for the property punctually according to his agreement, and hence it is of the first importance to me to be ready in ample time, to meet any difficulty which he may interpose. My agent, Mr. Berdan, has just been here and he has been overhauling all back taxes and I see nothing in the way of a clean title on receiving the deed from you. On the record the title is in Henry Anderson. The deed from the trustees and executors of Henry Anderson to me, and my warranty deed to Mr. Bronson, makes a perfect chain going back more than twenty-two years, possession has been held during all that time by me, and the taxes have been paid by me. I shall want your order on Mr. C. O. Halstead, Prest. of the Manhattan Bank, for delivery of the package containing the deed to me and if you will please direct him to open it, and to hand the deed itself to me, and take from me a receipt for it and my stipulation to return in place of it the cash payment of $2,000, to be paid by Mr. Bronson on delivery of deed, as soon as received, and also to deliver the bond and mortgage to Mr.

Bronson for $15,500 for the balance of purchase to him to take the place of the deed. You will see and appreciate the importance of placing me in a position to send forward the title papers to Mr. Waite at Toledo at the earliest possible moment, that he may be fully prepared to deliver the deed with the evidence of title before the first of May, and may anticipate and be prepared to obviate any exceptions which Mr. Bronson may be prompted to take to the title.

"I have no doubt he will be very glad to avail of the slightest pretext to get rid of the contract. I will have the business done with perfect security to you, and trust that you will give to it your immediate attention.

"In haste, truly yours,

"(Signed) CHARLES BUTLER."

Record 330-331.

It is of interest to note that the Mr. Waite referred to in the foregoing letter was afterward appointed Chief Justice of the Honorable the Supreme Court of the United States.

Your petitioner respectfully submits that it fairly appears that by direction of James H. Anderson, or of the executors and trustees, the deed of the latter was delivered by Mr. Halstead, or by the bank, to Charles Butler on or about May 1, 1860, and was recorded May 2, 1860, in the office of the recorder of Lucas County, Ohio (Record 296-299).

April 16, 1860, the other executor and trustee of the estate of Henry Anderson, deceased, also executed a deed conveying to Charles Butler all of the property described in the Bissell mortgage. This was delivered to Mr. Butler May 1, 1860, and was at once recorded in the office of the recorder of Lucas County, Ohio (Record 300-302).

The above deeds are substantially the same, and in addition to conveying the title to Butler, recite that the premises therein described were held by Henry Anderson in his lifetime as a mortgage to secure a certain sum of money due from Charles Butler to Henry Anderson.

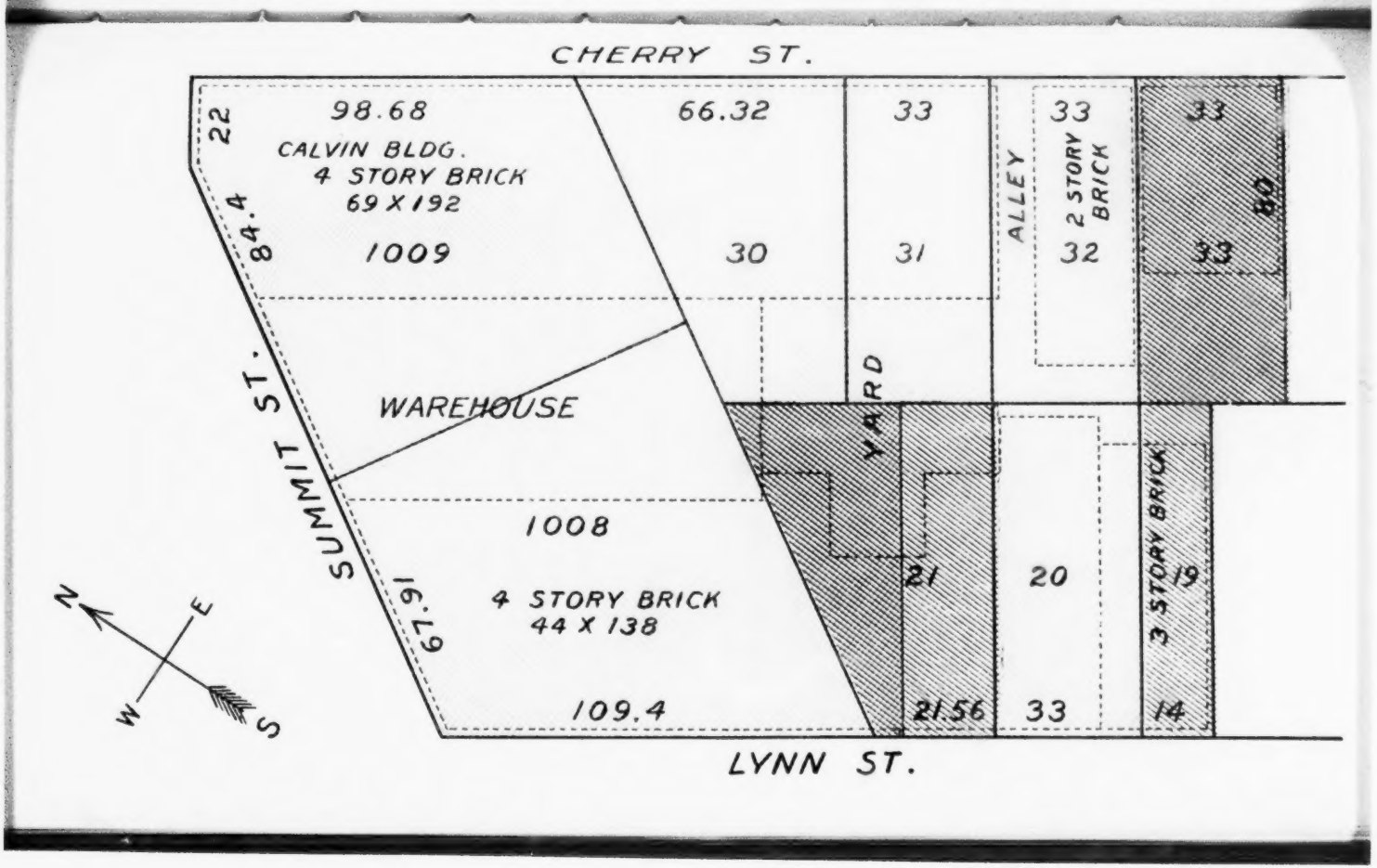
The provisions of these deeds are very clear and comprehensive, and were manifestly intended to absolutely convey the title to said Charles Butler in fee simple.

April 7, 1860, James H. Anderson and wife duly executed a quitclaim deed conveying to Charles Butler all the property described in the Bissell mortgage. Recorded May 2, 1860 (Record 289-291).

April 23, 1860, Charles Butler, in consideration of $17,500 then paid, by warranty deed sold and conveyed to Calvin Bronson, since deceased, grandfather of Messinger, under whom he claims, all of the premises in controversy in the case at bar, which deed was shortly thereafter delivered to Mr. Bronson, who at once recorded same and entered into possession and made valuable improvements on said premises, as Messinger has also done (Record 291-292-293-294).

Nearly forty-five years afterward, December 27, 1904, *Anderson v. Messinger* was commenced in the federal circuit court.

The matters in estoppel and bar pleaded by petitioner in his amended and supplemental pleadings are each and all duly sustained by certified transcript of the record in *Anderson v. United Realty Co., Messinger et al* (Record 65-150), and certified transcript of the record in the common pleas and circuit courts in the consolidated suits of *United States Mortgage & Trust Co. v. Anderson, Messinger et al.* (Record 150-289).


CHERRY ST.
98.68
66.32
33
33
33
22
CALVIN BLDG.
4 STORY BRICK
69 X 192
84.4
1009
30
31
ALLEY
2 STORY BRICK
32
33
33
80
WAREHOUSE
YARD
SUMMIT ST.
1008
3 STORY BRICK
21
20
19
67.9
4 STORY BRICK
44 X 138
N
E
W
S
109.4
21.56
33
14
LYNN ST.

IV

STATEMENTS CONCERNING PROPERTY INVOLVED IN ACTIONS IN FEDERAL AND STATE COURTS

Your petitioner respectfully represents that:

The plat on the opposite page shows the premises described in *Anderson v.Messinger* in the federal circuit court, and part of the premises involved in the suits in the state courts described in Messinger's amended and supplemental pleadings (Record 426, 33-38);

That the property involved in *Anderson v. Messinger* in the federal circuit court is shown on plat in red and in red and blue;

That the property involved in *Anderson v. United Realty Co., Messinger et al.* in the state courts, claimed therein by Messinger, is shown in blue, except triangular portion of lot 21 and all of lot 33 shown in red and blue. This triangular portion of lot 21 and lot 33 are described in the petition in said case, and we think are involved therein;

That a great deal of other valuable improved property was involved in *Anderson v. United Realty Co., Messinger et al.*, comprising part of lot 19 shown on the plat and premises adjoining lots 19 and 33 and extending southeasterly therefrom to Water Street; also valuable improved property extending from the easterly boundary line of Water Street to the thread of the channel of the Maumee River;

That the entire property shown on plat, except lot 33, is involved in the foreclosure suits in the state courts described in Messinger's amended and supplemental pleadings in *Anderson v. Messinger* (Record 426, 33-38);

That lot lines are shown in black, and outlines of buildings are indicated by dotted lines in black;

That the premises involved in the two actions comprise more than an entire square of improved property in the central part of the City of Toledo, of the aggregate value of about half a million dollars.

V

REASONS FOR GRANTING THIS PETITION

Your petitioner respectfully claims that the said decision and judgment of said circuit court of appeals and of said circuit court should be reversed for the following reasons:

Conflict of Decision between State and Federal Courts

1. Because of the direct conflict of decision existing between the supreme court of Ohio and the circuit court of appeals for the sixth circuit, with respect to the proper construction of the will of Henry Anderson, in suits between the same parties asserting titles to real property, depending upon and involving the same questions of fact and law, the effect of which conflict has been the unsettling of the title to a large tract of valuable improved real property near the center of the City of Toledo, Ohio, which has been in the quiet and peaceable possession of your petitioner and those under whom he claims for nearly fifty years.

The supreme court of Ohio, in an action of ejectment brought by respondent in the state court against your petitioner and others, held that by said will said testator devised to his sons, William and James H. Anderson, an estate in fee simple subject to defeasance upon their death without lineal descendants, and that as at the time of the death of James H. Anderson, the surviving son of said testator, his son, Peter Anderson, respondent herein, was living, the fee devised to his father, James H. Anderson, became absolute under said will, and respondent herein succeeded to no interest thereunder. (*Anderson v. United Realty Co., Messinger et al.*, 79 O. S. 23 *et seq.*)

This decision of the supreme court of Ohio affirmed the judgment of the common pleas court of Lucas County, Ohio,

rendered March 31, 1906, and, your petitioner submits, follows a long established rule of property and course of decision in Ohio, and reaffirms the settled construction of Section 5970 of the Revised Statutes of Ohio, adopted and in effect since 1840.

June 5, 1906, about two months after this decision by the state court, in *Anderson v. Messinger*, an action of ejectment also brought by respondent in the federal court against your petitioner, the circuit court of appeals rendered its decision holding that by said will, respondent, as the lineal descendant of James H. Anderson, the surviving son of said testator, took an estate in remainder upon the decease of his father, James H. Anderson. (*Anderson v. Messinger*, 146 Fed. 929.)

Your petitioner respectfully represents that upon the authorities cited in brief filed and submitted herewith, the construction of said will by said circuit court of appeals and said decision are erroneous and contrary to the rules, decisions and principles of law laid down by this honorable court and the supreme court and the statutes of Ohio applicable to such cases.

The gravity and importance of the questions concerning title to valuable real property, the review of which is sought by your petitioner, and the fact that the case of *Anderson* v. *United Realty Co.*, your petitioner and others involving the same questions of fact and law, is pending before this honorable court upon respondent's petition in error to the supreme court of Ohio, render it eminently proper that this honorable court should entertain jurisdiction of the action in the federal court, and thus ensure harmony of decision and the due preservation of the dignity of the state and federal courts.

Construction of Will by Circuit Court of Appeals Disregarded Ohio Statute and Decisions

2. Because said circuit court of appeals in *Anderson v. Messinger* erred in construing the will of Henry Anderson, and because in the last trial of said case, said court and said circuit court erred in refusing to follow and give effect to said decision of the supreme court of Ohio in *Anderson v. United Realty Co., Messinger et al.*, 79 O. S. 23, affirming the *first final judgment* construing said will, rendered by the court of common pleas of Lucas County, Ohio, March 31, 1906, *no final judgment* construing said will having been rendered by said circuit court until June 2, 1908, thereby departing from the established rule that the federal courts must look to the law of the state in which land is situated for the rules which govern its descent, alienation and transfer and for the effect and construction of wills and other conveyances.

The Federal Courts Denied Full Faith and Credit to State Judgments and Decrees

3. Because the circuit court and the circuit court of appeals erred in failing and refusing to give full faith and credit to the duly pleaded and proved judgments and decrees of the state courts:

1st. With respect to *Anderson v. United Realty Co., Messinger et al.*, your petitioner respectfully submits:

It was the respondent, represented by the same attorneys, who brought this action at law in the state court, joining your petitioner therein with other defendants, and the action of *Anderson v. Messinger* in the federal court, wherein your petitioner was the sole defendant.

The action in the federal court was begun first, but final judgment was first rendered in the action in the state court.

The first trial of *Anderson v. Messinger* in the federal circuit court resulted adversely to respondent, and he thereupon brought suit in the state court, with the manifest pur-

pose of trying his chances in a jurisdiction wherein he hoped for better success than had attended him in the federal court.

In each action, respondent based his claim to the property involved, solely upon said will of his grandfather, Henry Anderson. These actions presented the same issues, and the title asserted by respondent and your petitioner, respectively, in each to the property involved therein, was the same and based upon the same facts and required and resulted in a judicial determination by each of said courts of the same questions of fact and law.

Where suits are pending between the same parties, which involve the same issues, in two courts of concurrent jurisdiction, it is the first *final judgment*, although it may be rendered in the second suit, which renders the issues *res adjudicata* in the other court, and closes the controversy.

This rule is sustained by every consideration of justice and public policy, and any other would result in endless uncertainty and confusion.

Your petitioner has, by the state courts, been adjudged to be the owner of part of lots 19 and 21 shown on plat in blue, and petitioner and his codefendants have been adjudged to be the owners, respectively, of all of the other property sought to be recovered in the action in ejectment in the state court, comprising the remainder of the same square, adjoining the premises shown on plat.

2d. With respect to judgments and decrees of state courts in equitable suits, your petitioner respectfully submits:

In addition to the final judgment of the state court in the action of *Anderson v. United Realty Co., Messinger et al.*, rendered March 31, 1906, your petitioner in *Anderson v. Messinger* duly pleaded, proved and relied upon the final decrees of the state courts in the suits in equity brought by the United States Mortgage & Trust Company to foreclose its mortgages on your petitioner's property, which involved

the same title, and involved and determined the same and additional questions of fact and law as were involved in said action in the federal court.

Your petitioner and respondent were parties to these suits, and each appeared therein, and asserted and litigated their respective claims to the mortgaged premises, which include all of the property shown on plat except lot 33. In these consolidated suits, the title to all of the property involved in *Anderson v.Messinger* in the federal court was adjudicated, and the common pleas court of Lucas County, Ohio, on June 5, 1907, rendered final decree therein in favor of your petitioner and against respondent, and thereby determined that the latter had no right, title, estate, claim or interest whatsoever in or to said premises, or any part thereof.

Upon the authority of *Wilcox v. Consolidated Co.*, 212 U. S. 19-40, it is established that a plaintiff cannot be forbidden to try the facts upon which his right to relief is based, before a court of his own choice, if otherwise competent; and it is therefore clear that the United States Mortgage & Trust Company had the undoubted right to determine for itself in what jurisdiction it should begin its proceedings in foreclosure against your petitioner's property.

It brought suits for this purpose in the state court, and thereupon respondent duly instituted proceedings for their removal to the federal court, where they were pending on motions to remand when *Anderson v. Messinger* came on for its second trial in the same court.

Before proceeding further therein, counsel for respondent submitted a formal motion to the circuit court, directing its attention to these suits and petitioner's proceedings therein upon cross-petition, and moved the court for an order staying proceedings in the law case before it until after final determination of the equitable suits.

Later, and after oral argument and after counsel had submitted briefs, the circuit court granted the several motions to remand and ordered the foreclosure suits remanded to the state court.

It is of interest to note in passing that this order was fully sustained by the case of *Bradley v. Parkhurst,* 20 Kan. 462-465-467, the opinion therein having been rendered by Mr. Justice Brewer when a member of the supreme court of Kansas.

Clearly it was the right of petitioner and the duty of his counsel to defend any claims made in these suits with respect to the mortgaged property, and as the party in possession of the premises in controversy, your petitioner was certainly at liberty, under the provisions of the Ohio statutes, to bring an action therein, as he did, upon cross-petition against respondent, to quiet title, and to cause process to issue thereon. (Sec. 5779 R. S. O. Sec. 5067-5069 R. S. O. *Southward v. Jamison,* 66 O. S. 290.)

Shortly after the remanding of these suits, counsel for respondent voluntarily appeared in both of them, and after issues duly joined between all the parties thereto both upon the petitions and cross-petitions therein, these suits were duly consolidatd by consent of all parties and were heard by and submitted to the court of common pleas upon said issues and upon the evidence duly produced and offered before the court; and on such hearing and submission, final decree was entered therein June 5, 1907 (Record 258).

Not only were the foreclosure suits duly remanded by the federal court to the state court, but the latter, upon the authorities above cited, in proceeding therewith and in rendering its final decree therein, in no respect questioned the decision of the circuit court of appeals in *Anderson v. Messinger* construing the will of Henry Anderson, and the rendering of such decision by the circuit court of appeals did

and could in nowise limit the power of the state court to hear and finally determine a cause properly before it.

Since the construction of the will in question in nowise affected the right of the state court to render decree in the suits before it, petitioner respectfully submits that it should follow that the decision of the circuit court of appeals with respect thereto afforded no warrant to the federal courts for disregarding and refusing to give effect to the judgments and final decrees of the state courts.

The common pleas court, by its decree in these consolidated suits, further found that Henry Anderson held this property as security for the payment of a debt owed to him by Charles Butler, and for no other purpose; that this indebtedness had been paid in full and had been released and discharged by Anderson's executors; that Messinger was entitled to have a release, discharge and conveyance from Peter Anderson, respondent, of any and all claims, interest, lien or title which he had or claimed to have against said premises, the claim asserted thereto by respondent in *Anderson v. Messinger*, under the deed from Edson Allen, master commissioner, being specifically described in the decree.

And by said decree rendered June 5, 1907, your petitioner and respondent both being voluntarily before said court and therein asserting their respective claims to said premises, the title of your petitioner was duly and fully quieted against all claims and demands thereto on the part of respondent, and it was ordered, adjudged and decreed that respondent should, within three days from the entry of said decree, execute and deliver to your petitioner a proper deed of release and quitclaim of any and all claims, interest, lien or title in or to said premises, and each and every part thereof, and that in default thereof, said decree should operate as such conveyance, and respondent was duly barred and forever enjoined from setting up, asserting or claiming any claim,

interest, lien, right, title or estate in or to said premises, or any part thereof.

By Section 5318 of the Revised Statutes of Ohio, passed and in effect, in substantially the same form, since February 19, 1810, it is provided that when the party against whom a judgment for a conveyance, release or acquittance is rendered, does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance, release or acquittance had been executed conformably to such judgment. This statute was construed and approved by this honorable court in 1827, and by the supreme court of Ohio in 1828, but was disregarded and denied effect by the federal courts in *Anderson v. Messinger.*

Your petitioner respectfully submits that beyond question both the common pleas and circuit courts of Lucas County, Ohio, had jurisdiction of the subject-matter of the foreclosure suits and also of the person of respondent and the other parties thereto, both upon the petition of the plaintiff therein, United States Mortgage & Trust Company, and upon the cross-petition of your petitioner; and since the Honorable the Supreme Court of the United States has declared that the federal courts cannot reverse or set aside final judgments rendered by a state court, which had complete jurisdiction of the parties and subject-matter (*Nougue v. Clapp*, 101 U. S. 551), your petitioner respectfully submits that the action of the federal circuit court and of the circuit court of appeals in disregarding and refusing to give effect to the final judgments and decrees of the state courts, invaded, impaired and defeated your petitioner's rights under the federal Constitution.

Custody of Property in State Court

4. Because the custody of the property involved in *Anderson v. Messinger* is solely vested in the state court, and must be administered thereby. The authorities sustain the view that the bringing of the foreclosure suits invested the state court with the custody of the *res;* but, however this may be, it expressly appears (Record 287-288) that on May 6, 1907, judgment was entered in these suits in the state court, and that thereupon execution was duly issued thereon and levied upon the premises in controversy, and duly returned; and your petitioner respectfully submits that unless the Honorable the Supreme Court of the United States will entertain jurisdiction herein, protracted litigation in both the state and federal courts must necessarily ensue before the rights of the parties to the premises can be finally determined, with the imminent possibility of direct conflict between the state and federal authorities in the discharge of their official duties with respect to the possession of said property, under the *directly* opposite judgments of the federal and state courts.

The Law of the Case was Improperly Held to Avoid Defense of *Res Adjudicata*

5. Because the circuit court of appeals erred, by its last decision in *Messinger v. Anderson,* in holding, upon issues and facts then first presented for its consideration and determination, that its former decisions therein had finally declared and determined the law of the case, and that the court was without power to pass upon such new issues and facts; and because the circuit court of appeals and the circuit court each erred in disregarding and failing to give effect to the state judgments and decrees, first duly pleaded and proved upon the last trial of this case.

Disregard by Federal Courts of Ohio Statutes Defeated Petitioner's Right of Trial by Jury

6. Because of error on the part of said circuit court upon the last trial of *Anderson v. Messinger*, in refusing to submit to the jury duly certified copy of the deed of the executors and trustees of Henry Anderson dated October 9, 1855, and recorded May 2, 1860, conveying title to Charles Butler of all of the property in controversy in the federal and state courts, with the other evidence relating thereto; and because said circuit court, in the foregoing and other respects, erred in directing a verdict in said action in favor of respondent against the objection and exception of your petitioner; and because the circuit court of appeals erred in sustaining said action on the part of said circuit court by affirming the judgment entered in pursuance thereof.

Your petitioner respectfully submits that Henry Anderson's sole interest in Charles Butler's Toledo property was as trustee for Butler.

Respondent admits and the record (p. 50) establishes that on September 23, 1841, Henry Anderson first acquired any right in said property, and that this right was taken in trust for Butler and as collateral security for the payment of Butler's $20,000 note, and your petitioner claims that neither Henry Anderson nor his estate ever had, as against Charles Butler and those claiming under him, any other right, title or interest in or to said property, or any part thereof, and that there never was any foreclosure or release of Butler's equity of redemption.

It appears by undisputed and indisputable evidence that Mr. Butler paid every dollar of his indebtedness with interest to the executors and trustees of the estate of Henry Anderson (Record 294-295-296, 343), and in any view of the law, upon payment being received, it became and was the duty of said executors and trustees to release and convey all of the

interest and title of said estate in said property to Charles Butler; and we further claim that such release and conveyance was effected by the deed of Peter Anderson and Walter Goodman, two of said executors and trustees, to Charles Butler, dated October 9, 1855, and duly recorded May 2, 1860, in the office of the recorder of Lucas County, Ohio.

A duly certified copy of this deed was offered in evidence upon the trial of this case before the circuit court, and thereby *prima facie* evidence was furnished of the payment of Butler's indebtedness and of the execution and delivery of said deed to Charles Butler at its date, viz.: October 9, 1855, but said circuit court refused to consider or give any effect to said deed, and contrary to the established course of decision by the federal courts and the supreme court of Ohio and the statutes of Ohio, refused to submit same with other evidence to the jury.

Circuit Court of Appeals Erred in its Construction of Butler-Anderson Contract, Affecting Title to Real Property

7. Because in *Anderson v. Messinger*, the circuit court of appeals erred in the construction and effect given by said court to the contract between Henry Anderson and Charles Butler, dated October 4, 1844.

The record evidence offered by respondent (Sec. 2, Stipulation No. 1 — Record 50) clearly showed that Henry Anderson acquired his interest in Butler's Toledo property in trust, and the burden of proving the termination and discharge of such trust by clear and satisfactory evidence was cast upon respondent. Your petitioner contends that there was an entire failure of proof in this regard.

Notwithstanding respondent's written stipulation admitting that Henry Anderson acquired his right to Charles Butler's property *in trust* by assignment of the Bissell mortgage,

evidenced by the public records of Lucas County, Ohio, from and after September 30, 1841 (Record 51); that Butler was not a party to, was not served with process and did not appear in the proceedings to foreclose this mortgage (Record 51-52), whereby respondent claims his testator acquired the legal title to said property; that no evidence whatever was offered showing or tending to show that Mr. Butler ever received anything in cash, by way of credit or otherwise from Henry Anderson, or those representing him, for this valuable property; the clear and convincing written evidence that Butler was required by Henry Anderson's executors and trustees to pay and paid every dollar of his indedtedness with interest (Record 294-296, 343); and notwithstanding the clearly evidenced transactions between Mr. Butler and Henry Anderson's executors and trustees, including their formal deeds and releases (Record 296-302), and also Mr. Butler's agreement with each of the sons, and Mr. Butler's long continued care and preservation of the mortgaged property and the payment by him of large sums in satisfaction of taxes and assessments thereon (Record 302-318), the circuit court of appeals held that by the contract of October 4, 1844, Mr. Butler's equity of redemption in all this property was released, and that thereby Henry Anderson acquired absolute title thereto.

Your petitioner respectfully represents that by the contract of October 4, 1844, the mortgaged property was expressly recognized as substituted for the mortgage, and thereafter as theretofore was held by Henry Anderson and his legal representatives in trust to secure Charles Butler's debt and subject to his right to redeem; and that Mr. Butler never received anything whatever for this property is rendered perfectly clear from the account stated October 1, 1852, between Charles Butler and Anderson's executors and trustees (Record

294-295), wherein Mr. Butler is charged with

the full amount of his note of July 1, 1841, for	$20,000.00
and interest thereon to October 1, 1852, 11 years, 3 months, at six per cent....	13,500.00
making a total indebtedness, principal and interest, of	$33,500.00

An examination of the credits allowed in this account stated, consisting of commissions due Charles Butler from the estate of Henry Anderson upon warranties made for the American Land Company, and interest, and three cash payments and interest thereon, shows the total amount of credits allowed Mr. Butler to October 1, 1852, to be $17,830.04, and left the amount due from him to the estate at said date, $15,669.96, on which date Butler paid thereon $1,669.96 (Record 295), leaving due a balance of $14,000.00.

Your petitioner respectfully submits that if the sale of the Toledo property in the foreclosure proceedings had been then regarded as having divested Mr. Butler of his title, that he should then, in any view of the case, have had additional credit as a payment upon his note in the sum of $6,921.00, the amount bid for the property by Henry Anderson, and the further sum of $3,322.00 by way of interest thereon from September 24, 1844, the date of the sale, amounting in the aggregate to $10,243.00; and had such credit been allowed to Mr. Butler, the balance owing by him to the Anderson estate October 1, 1852, would have been $3,757.00 instead of $14,000.00 shown by said account stated.

Your petitioner further respectfully represents that from the record it clearly appears not only that Mr. Butler never received one dollar from Henry Anderson or his estate for his Toledo property, but by a simple computation, it is equally clear that he paid every penny of his indebtedness and interest thereon in full.

The payments made by Mr. Butler after October 1, 1852, are clearly evidenced in writing, and are as follows:

October 1, 1853 (Note, Record 296).....$7,340.00
Paid as per 9th report (Record 296)..... 3,000.00
Paid as per 10th report (Record 296)..... 4,340.00
Paid as per 10th report (Record 296)..... 1,027.60

The note above referred to for $7,340.00 (Record 296) contained a provision that it should be credited upon Butler's $20,000.00 note, and was fully paid in cash, and on the trial of *Anderson v. Messinger* was produced from the custodian of the papers of Charles Butler, endorsed in blank by Messrs. Goodman and Anderson, as executors and trustees of the estate of Henry Anderson.

Your petitioner further respectfully submits that in some way the circuit court of appeals was led into a mathematical error with respect to the payments made by Mr. Butler upon his indebtedness, and reached the conclusion that same was not paid; and notwithstanding the clear state of the record in this regard, in the opinion (146 Fed. 949), says that this was so even after crediting him with the proceeds of the master's sale. Thereby the circuit court of appeals concedes that Anderson was not entitled to take the property without paying at least the amount bid therefor, but through inadvertence assumed that such payment was made to him.

The circuit court of appeals, in its opinion in *Anderson v. Messinger*, 146 Fed. 935, in discussing the contract of October 4, 1844, says: "It was not stated that the expected deed should be affected by a trust," and therefore concludes that it was not to be subject to one.

Your petitioner respectfully submits that inasmuch as the mortgaged property was then held by Anderson in trust, this fact, taken in connection with the other admitted facts of this case, did not warrant the circuit court of appeals in reaching the conclusion at which it arrived.

Your petitioner further respectfully submits that the circuit court of appeals, in construing said contract, further erred in holding (p. 935) that the provision thereof for the delivery of the possession of the railroad stock by Mr. Anderson to Mr. Butler, and the granting of a power of attorney by the former to the latter to release Mr. Bissell from personal obligation upon his note, stripped Mr. Anderson of the control of such stock and other security, since it appears by the express terms of the contract that Mr. Butler bound himself to faithfully apply and pay over to Mr. Anderson on account of the indebtedness of the former, all sums of money or other valuable consideration which Butler might receive or derive by reason of the surrender and relinquishment of said securities, and that Mr. Anderson's title thereto was thereby in nowise affected.

Your petitioner further respectfully submits that the rule of law is well established that the holder of negotiable instruments as collateral security, receiving the same so as to become a party thereto, does not lose his right and title thereto, nor to the proceeds thereof, by a redelivery of the same to the pledgor where such delivery is made upon agreement that the pledgor shall proceed, for and on behalf of the pledgee, to make collection thereof, or to do some other proper and necessary act in respect thereto, that in such cases the pledgor is regarded as the representative or agent of the pledgee, and he acts in a fiduciary character, and any funds received by him from or upon such collaterals, are the property of the pledgee, to be credited upon the principal debt.

Your petitioner further respectfully submits that the circuit court of appeals, in its construction of said contract, failed to give due regard to the express trust under which Mr. Anderson first acquired his interest in the property under consideration, and this is apparent from the following statement in the opinion, page 935:

> " We have given detailed exposition of special facts for the reason that it is proposed to fasten a trust upon the deed in question by proof of subsequent transactions, and thereby raise an equity which would entitle the defendant Messinger to the possession of the premises notwithstanding it should be held that plaintiff has the legal title."

Your petitioner respectfully submits that this conclusion of the circuit court of appeals seemingly disregards the fact that by the formal admission of respondent, his testator first acquired and continued to hold the property in trust, and that this was not released, discharged or affected by the contract of October 4, 1844, the master's deed, or by any transaction which thereafter occurred between Mr. Butler and Mr. Anderson, or his representatives, or his sons, or either of them.

Petitioner's Record Title to Real Property Destroyed by Incompetent Evidence

8. Because in *Anderson v. Messinger*, said circuit court and the circuit court of appeals erred in regarding the said contract of October 4, 1844, Butler's letters and other like proof as competent evidence to destroy petitioner's record title to the premises in controversy.

This contract and other unrecorded evidence unknown to your petitioner, were incompetent to destroy his record title, holding same under Calvin Bronson, a good faith purchaser.

On April 23, 1860, Charles Butler, in consideration of $17,500 then paid, by warranty deed sold and conveyed to said Calvin Bronson all of the premises the title to which is being litigated in both state and federal courts.

The record discloses no evidence whatever showing or tending to show that Calvin Bronson or your petitioner ever had any knowledge or notice of this contract, or of any other of the unrecorded dealings and transactions between Henry Anderson and Charles Butler.

Record Conclusively Establishes by Written Evidence that Charles Butler Paid Indebtedness to Anderson Estate in Full, with Interest, to Secure Release and Discharge of Claim and Lien Against Toledo Property

9. Because the circuit court and the circuit court of appeals erred in finding and holding that Charles Butler did not pay his debt to Henry Anderson and his estate, the record conclusively establishing by written evidence that Charles Butler paid every dollar of this indebtedness in full, with interest, the sum of $39,000.79 having been paid by him in cash to secure the release and discharge of Anderson's claim and lien against Butler's Toledo property.

Your petitioner respectfully submits that no conflict appears in the evidence with respect to the payments made by Charles Butler, but if it had been otherwise, then the circuit court erred in failing to submit all of the evidence with respect to payments to the jury and in directing a verdict for respondent and in rendering judgment thereon, and the circuit court of appeals erred in affirming this judgment.

Circuit Court of Appeals Disregarded Statutes and Decisions of Ohio Relative to Tax Title

10. Because upon the second trial in *Anderson v. Messinger* (158 Fed. 250), the circuit court of appeals erred in its construction of the statute and decisions of Ohio relating to tax title asserted by petitioner and evidenced by eight certified copies of tax deeds, dated March 26, 1860, and recorded April 2, 1860, conveying title to the premises in controversy to Charles Butler. At the last trial, these deeds were again offered in evidence by petitioner and were excluded (Record 302 to 318).

Your petitioner further respectfully submits that these tax deeds, by virtue of the Ohio statute (Sec. 7, Act of 1846, 44 Ohio Laws, 210; Sec. 4143 R. S. O.), were competent as *prima facie* evidence of title and, on general principles, were

also competent evidence tending to show Charles Butler's continued possession and care for the property, and were competent and persuasive, if not convincing, evidence that by or about their date, March 26, 1860, Charles Butler paid the full amount of his indebtedness to Henry Anderson's estate or to James H. Anderson, and thereby became justly entitled to the delivery of the deed of the executors theretofore deposited with Mr. Halstead, president of the Bank of Manhattan, of New York City.

Circuit Court of Appeals Erred in Reversing Second Judgment in Favor of Petitioner

11. Upon said second trial in the circuit court, both parties moved the court to direct a verdict. The court denied respondent's motion and granted that of your petitioner. A verdict was returned accordingly, and judgment entered thereon in favor of your petitioner. The action of the circuit court upon these motions conclusively determined the facts in favor of your petitioner, and the circuit court of appeals, upon the second writ of error thereto, erred in reversing this judgment.

Federal Courts Erred in Rendering Judgment Against Petitioner

12. Because in *Anderson v. Messinger*, the circuit court of appeals, upon each of the three proceedings in error submitted to and considered by it, erred in rendering judgment against instead of in favor of your petitioner, and because said circuit court erred in rendering judgment upon the last trial of said cause before it against instead of in favor of your petitioner.

Petitioner, by his counsel, respectfully submits herewith a brief citing authorities sustaining the foregoing reasons for the granting of this petition, and your petitioner respectfully refers this honorable court thereto.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court directed to the United States circuit court of appeals for the sixth circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in said cause therein entitled *Rosewell E. Messinger, plaintiff in error, v. Peter Anderson, defendant in error,* including a full and complete transcript of all proceedings of the said circuit court of appeals in said cause in two former proceedings in error therein known as Nos. 1479 and 1679, respectively, in said court, each being entitled *Peter Anderson, plaintiff in error, v. Rosewell E. Messinger, defendant in error,* to the end that the said cause may be reviewed and determined by this court as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891; that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate, and in conformity with the said act; and that the said judgment of the said circuit court of appeals and of said circuit court in said case, and every part thereof, may be reversed by this honorable court.

Your petitioner will ever pray.

ROSEWELL E. MESSINGER,
Petitioner.

CLAYTON W. EVERETT,
OLIVER B. SNIDER,
HARRY E. KING,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO,
LUCAS COUNTY, } ss.

Rosewell E. Messinger, being first duly sworn, states that he is the petitioner in the foregoing petition; that he has read said petition subscribed by him and knows the contents thereof; that the facts stated therein are true except those stated on information and belief, and as to such statements he believes same to be true.

ROSEWELL E. MESSINGER.

Sworn to before me and subscribed in my presence this 19th day of October, 1909.

(Seal)

HARRY E. DUGUID,
Notary Public, Lucas County, Ohio.

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Office Supreme Court, U. S.
FILED.
FEB 2 1910
JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1909

No. [redacted] 350 150

ROSEWELL E. MESSINGER
PLAINTIFF IN ERROR

vs.

PETER ANDERSON
DEFENDANT IN ERROR

MOTION TO ADVANCE

RHEA P. CARY,
Attorney for Defendant in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1909

No. 648

ROSEWELL E. MESSINGER
PLAINTIFF IN ERROR

VS.

PETER ANDERSON
DEFENDANT IN ERROR

MOTION TO ADVANCE

Now comes the above named defendant in error, Peter Anderson, and moves the Court to advance the hearing of this cause to as early a date as may be practicable and convenient to the Court, and submits, in connection with his said motion, the following brief statement of the matters involved and of the reasons moving him to such action:

STATEMENT OF MATTERS INVOLVED.

This is an ejectment case, involving primarily the title to certain valuable real estate in the city of Toledo, Ohio. The

judgment of the Circuit Court of Appeals for the Sixth Circuit was in favor of defendant in error, who was the original plaintiff.

The plaintiff in error obtained from this Court on November 8, 1909, the writ of certiorari to said Circuit Court of Appeals.

There was involved in the case many questions of law, including the proper construction of the will of one of the predecessors in title of both parties, the validity, force and effect of certain alleged equitable defenses or claims of title, res adjudicata, superiority or inferiority of outstanding mortgage liens, binding effect of State Court decisions and possible clash of Federal and State courts.

Anything approximating a full statement of the matters involved would be utterly impossible within the limits of the "brief statement" required by the rules of this Court in respect to motions to advance. It is even true that an intelligent statement within the limits mentioned is well-nigh impossible, and we therefore respectfully invoke an examination by the Court of the opinion of *Lurton, J.*, in *Messinger v. Anderson*, rendered June 17, 1909, reported in 171 *Federal Reporter*, page 785.

Our conception of the importance to this motion of such a clear statement as is therein contained, shall serve as our plea for extenuation at the hands of the Court for citing that full and elaborate opinion and inviting its perusal.

REASONS FOR MOTION TO ADVANCE.

First. From the record herein and from the opinion of the Circuit Court of Appeals, it is apparent that the ques-

tion of conflict of decision has already arisen and must ultimately be settled and can only be settled by this Court. Incidental to this question is the one involving the binding or conclusive effect of State Court decisions upon the Federal courts.

These questions were deemed by this Court to be of sufficient importance to justify the issuance of the extraordinary writ of certiorari, as the result of which this cause is now here.

Second. The United States Mortgage & Trust Company held two mortgages upon the property involved herein, executed by the plaintiff in error prior to the beginning of this suit, and to which the defendant in error was not a party. The mortgagee brought suit in the State Court to foreclose, joining as defendants both parties hereto. Plaintiff in error filed his answer and cross petition against defendant in error, seeking to have his title quieted as against the latter, who unsuccessfully defended both actions against him, finally taking the litigation to the Supreme Court of Ohio where it is now pending on error proceedings and *set for hearing for March 4, 1910.* All of the foregoing facts appear upon this record, save and except the statements regarding the Supreme Court of Ohio.

It is perfectly plain that the result of the litigation in the Supreme Court of Ohio may be dependent upon the determination of this cause by this Court. The very State Court litigation referred to is here pleaded by plaintiff in error as res adjudicata, and the decision of the question by this Court at this time may be a finality and conclusive of all issues between the parties.

Third. An early hearing in and determination by this Court of this cause will prevent the possibility of a clash

between the officers of the State and Federal courts in executing judgments or decrees conflicting in their results. For instance, should the State Court affirm the lower court, and this Court subsequently affirm the Circuit Court of Appeals, two results would be reached diametrically opposite in their effect, and an actual, physical conflict would be inevitable. Only by the action sought by this motion could such possibility be removed.

Wherefore, because of the reasons above set forth, and others apparent upon the face of the record, the defendant in error, Peter Anderson, respectfully prays that this cause be advanced and speedily heard and determined.

RHEA P. CARY,
Attorney for Defendant in Error.

/3

FILED.
NOV 1 1909
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States

No. [redacted]150

ROSEWELL E. MESSINGER,

Petitioner,

vs.

PETER ANDERSON,

Respondent.

REPLY BRIEF FOR PETITIONER.

CLAYTON W. EVERETT,
OLIVER B. SNIDER,
HARRY E. KING,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

No. 648.

ROSEWELL E. MESSINGER,

Petitioner,

vs.

PETER ANDERSON,

Respondent.

REPLY BRIEF FOR PETITIONER.

In reply to the claim that *Anderson vs. United Realty Company*, 79 O. S., 23, is not the settled law of Ohio, we submit that the law of Ohio on this subject has been settled ever since *Niles vs. Gray*, decided in 1861, which holds that in such a devise the first donee takes

> "* * * * an estate in fee simple, subject however, to be determined by the contingency of her dying without issue living at the time of her death on the happening of which the estate would pass over by way of executory devise."
>
> Niles vs. Gray, 12 O. S., 320. Syllabus No. 3.

Afterwards in 1881 in *Piatt vs. Sinton*, 37 O. S., 353, the supreme court said:

> "Where there is a devise in fee, with a provision in the will that in case the devisee should die without leaving any legitimate heirs of her body, then the estate should go over to persons named, the fee taken by the first devisee is determinable only on the contingency of her dying without leaving such heirs living at the time of her death." *Niles vs. Gray* (12 Ohio, St., 320), followed.

Again in the opinion on page 355 the court says:

> "The construction of the will now in controversy is governed by the decision of *Niles vs. Gray*, 12 O. S., 320. That case was decided in 1861 and has become *a rule of property* in this state, and we are not now disposed to reconsider it."

Again in 1883 the Ohio supreme court said:

> "It has long been settled law in Ohio that limitations over of personal property, by way of executory bequest, are valid, and have like effect and operation as in the case of executory devises of realty. And since the decision of *Niles vs. Gray*, 12 Ohio St., 320, followed and affirmed in *Piatt vs. Sinton*, 37 Ohio St., 353, it cannot be doubted but that a devise or legacy, with such limitations as are contained in the will before us, operates to pass to the devisee or legatee an absolute estate in fee determinable only upon the happening of the contingencies provided for."
>
> Martin vs. Lapham, 38 O. S., 541.

Both of these decisions were made after *Shaw vs. Hoard*, 18 O. S., 227. One of them expressly and the other impliedly declares that *Niles vs. Gray* has become a rule of property in Ohio.

Next in order came *Anderson vs. United Realty Company*, 79 O. S., 23-24, which follows the early cases above cited.

How can it be claimed that *Anderson vs. United Realty Company* is not the settled law, when it follows the early cases.

The wills construed in *Niles vs. Gray* and *Piatt vs. Sinton* were executed before the statute of 1840, now Section 5970 of Revised Statutes of Ohio was passed; hence said statute is not referred to in either of those cases.

This statute in effect carries out the same public policy expressed in *Niles vs. Gray* and *Piatt vs. Sinton.*

It declares:

> "Every devise of lands, tenements or hereditaments in any will hereafter made, *shall* be construed to convey all the estate of the devisor therein, which he could lawfully devise, *unless it shall clearly appear by the will that the devisor intended to convey a less estate.*"

Can any lawyer say that it *"clearly appears"* in Henry Anderson's will, "that he intended to convey a less than a fee simple estate to his surviving son?" If not then this honorable court should be governed by and follow its decision in *Roberts vs. Lewis,* 153 United States, 367.

Counsel for respondent ignores our position in regard to the effect of the decrees in the common pleas and circuit courts of Ohio, in the case of the *United States Mortgage & Trust Company vs. Anderson et al.*

He says the judgment in the circuit court was for only a small part of the property, but while this is true it is also true that the state circuit court reserved its consideration and decision with respect to all the rest of the property involved (last record, p. 287) which included all the property involved in the case of *Anderson vs. Messinger* in the federal court.

The decree in the common pleas court was for all the property involved in this case, and under the statutes and decisions of Ohio, the judgment and decree of the common pleas court remains in full force and effect until modified or reversed by the higher court.

Our position on this important matter is set forth in Section IV, on pages 7 to 11 both inclusive in our brief in chief and in the petition herein, pp. 30 to 35, citing *Jenny vs. Walker*, 80 O. S., 153, to which the attention of this court is respectfully directed.

We respectfully submit that whether or not the federal courts have given due faith and credit to the judgments and decrees of the state courts, presents a question of national importance and one which fully warrants this honorable court in entertaining jurisdiction herein.

Beyond doubt there is a *conflct of decision between state and federal courts* since the supreme court of Ohio has awarded the title to the real estate (separate portions of a block of property) to one party and the Circuit Court of Appeals has awarded the title to another party, each of said courts basing its conclusions upon the same will as a link in the chain of title.

Respectfully submitted,

CLAYTON W. EVERETT,

OLIVER B. SNIDER,

HARRY E. KING,

Counsel for Petitioner.

Supreme Court, U. S.
FILED
NOV 1 1909
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. [redacted] 150

ROSEWELL E. MESSINGER,
Petitioner,

vs.

PETER ANDERSON,
Respondent.

BRIEF ON BEHALF OF RESPONDENT UPON PETITION FOR CERTIORARI.

RHEA P. CARY,
Counsel for Respondent.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

Supreme Court of the United States.

ROSEWELL E. MESSINGER,
Petitioner,

AGAINST

PETER ANDERSON,
Respondent.

BRIEF ON BEHALF OF RESPONDENT UPON PETITION FOR CERTIORARI.

The petitioner herein has served upon me a brief of twenty-two pages in support of a petition of forty-four pages, the prayer of which is for the issuance of a writ of *certiorari*. Not more than two pages of each document is devoted to a discussion of the propriety of or necessity for the writ. The remainder of each is confined to respectful criticisms of the Circuit Court of Appeals for the 6th Circuit, and argument upon the merits of the case.

Unless I have totally misconceived the applicable rules and principles governing a writ of *certiorari*, this Court will in no way concern itself with the merits of the case unless and until it has determined that a proper case has been presented for the allowance and issuance of the writ.

Assuming my position in this regard to be well taken, I shall forego any extended reply to the major portion of the petition and brief after citing this Court to the various able and exhaustive opinions of Circuit Judges LURTON and SEVERENS upon the three hearings of the case at bar in their Court. These opinions are the most finished and thorough arguments which could be made in support of the correctness

of the final result reached in the lower Court. They are reported in the order of their rendition as follows:

146 Fed., 929, by Judge SEVERENS.
158 Fed., 250, by Judge SEVERENS.
171 Fed., 785, by Judge LURTON.

The last volume (171 Fed.) is not yet out in bound form, but the report appears in the advance sheet number of October 7, 1909.

No Proper Case Presented For Allowance of Writ.

Under the judiciary act creating the various Circuit Courts of Appeals throughout the country, the power of this Court to issue writs of *certiorari* to those Courts was reserved, has been in many subsequent cases repeatedly affirmed, and is now established beyond question. The issuance of the writ is a matter resting solely in the sound discretion of this Court, and no fixed or inflexible rules have ever been promulgated by which such discretion is to be measured or judged. General principles, however, have been declared by this Court in various cases, and whenever application is made for a writ, the natural inquiry arises as to whether or not the instant case comes within the purview of those enunciated principles. Perhaps the leading case upon the subject is

Forsyth vs. Hammond, 166 U. S., 506.

In that case Mr. Justice BREWER dealt at length with the purpose of the creation of the Circuit Courts of Appeals, setting forth the necessity for such action by Congress, and enumerating the reasons for the reservation of power now invoked by Mr. Messinger in this case. Among other observations made by the learned Justice in this latter connection is the following:

> "Cases of a class in which finality of decision was given to the Circuit Courts of Appeal, might involve *questions of such public and national importance* as to require that a consideration and determination thereof should be made by the Supreme Tribunal of the United States."

After establishing the unquestionable power of this Court to issue the writ, the opinion observes:

> "Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the courts of appeal. So exercised, it might burden the docket of this court with cases which it was the intent of Congress to terminate in the Courts of Appeal, and which brought here would simply prevent that promptness of decision which in all judicial actions is one of the elements of justice.
>
> "So it has been that this court, while not doubting its power, has been chary of action in respect to *certioraris*. It has said: 'It is evident that it is *solely questions of gravity and importance* that the circuit courts of appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the court of appeals is made final, to be certified, can be properly invoked.'"

To sustain this statement, the case of *Ex parte Lau Ow Bew*, 141 U. S., 583, and others, are cited.

In the Forsyth case the Court says:

> "We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in *certiorari* extends to every case pending in the Circuit Courts of Appeals, and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute, would be finally determined in that court. And further, that while this power is co-extensive with all possible necessities, and sufficient to secure to this court a final control over the litigation in all courts of appeal, *it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal*, or *between courts of appeal and the courts of a state*, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

Within the last quotation appearing above must come the case at bar, in order that serious consideration may be given to the application for the writ. It is manifest that this case involves no question affecting the interests of the nation in its internal or external relations. It is equally obvious that the question involved is one of no national importance whatever. So also it is perfectly plain that no possible conflict between two or more courts of appeals can arise either with or without the interposition of this court. According to the declaration in Forsyth vs. Hammond, the only possible ground for its issuance would be the avoidance of a conflict between the United States Circuit Court of Appeals for the 6th Circuit and the Supreme Court of the State of Ohio. It then becomes vital to consider and ascertain what is meant by "the avoidance of a conflict" between those courts.

The opinion of his Honor Circuit Judge LURTON *even throws doubt upon the existence of a conflict of opinion*, as will be most apparent from the following quotation from that opinion:

> "That this court did not depart from any well-settled line of decisions by the Supreme Court of Ohio, applicable to the construction of the devise in the will of Henry Anderson which was involved, will be quite apparent upon examination of the opinion of this court, as reported in 146 Federal, 929, and a comparison with the opinion of the Supreme Court of Ohio construing the same clause, as reported in 79 Ohio State, 23.
>
> "We found in the case of Shaw v. Hoard, 18 Ohio State, 228, an exposition of the applicable law of Ohio, which the opinion of the Supreme Court of Ohio by Judge SUMMERS concedes, 'supports the contention of the plaintiff.' We concluded from an examination of later cases in that Court, that while in some particulars not relevant to the will of Henry Anderson, Shaw v. Hoard had been distinguished, but had not been overruled. The Supreme Court of Ohio in Anderson v. Messinger seems to conclude that, in effect, Shaw v. Hoard had been so far modified or distinguished as not to be conclusive evidence of the law in Ohio. Assuming for the purpose of this case that the effect of later

decisions which did not expressly overrule that case was to unsettle it as a rule of decision, it clearly left the law of Ohio, considered as a local rule of property, applicable to the words of the devise involved, in such an uncertain state as to compel this court to apply to the will the settled rules of the common law applicable. Upon this aspect of the matter Judge SEVERENS said, that 'if it should be held that the rule of construction is not settled, this court would decide the question upon its own understanding of the law applicable to it.'

"But it has been urged that we may not look to the opinion of the Ohio Court for the purpose of determining the law of the case, but only to the sylibi of the case. The Ohio court has long since adopted a rule, that the law of the case by which the court is bound is that stated in the sylibi of the case (see Rule 6, 5 Ohio State, page 7 of the preface, and same rule, page 10, preface, of 73 Ohio State).

"If we accede to this, we find no rule of property there stated which necessarily conflicts with the opinion of this court.

"That syllabus reads as follows:

"'Where, in a will, there is a devise to a son, and if he dies without lineal descendants, living at the time of his decease, then over, *these words are not, by themselves, without assistance from other parts of the will*, sufficient to create an estate by implication in the lineal descendants, but the son takes a fee defeasible upon his death, without lineal descendants, living at the time of his decease, and in the event of lineal descendants living at the time of the son's death, his fee becomes absolute, and such descendants have no interest under the will as against his grantee.'

"This court found 'assistance from other parts of the will' in reaching the conclusion we did, as will be seen by consulting the opinion. It will also be noticed that the opinion of the Ohio Court, as exhibited by that of Judge SUMMERS, does not deal with circumstances to which we attached importance.

But if we confine ourselves to this syllabus, it is im-

possible to say that from it alone we should be able to treat the decision as a declaration of the settled law of Ohio, constituting a rule of property, which this court ought to follow. It is apparently no more than an interpretation of a particular will, and as such, under the cases cited above, is not such a decision as we are under obligation to follow as a local rule of property."

Obviously, the real inquiry is as to what is meant by the expression "a conflict between the Federal and State Courts." I submit that this clearly means a clash between the officers of the respective courts who are directed to execute the judgments or decrees of those courts. To my mind the ordinary signification of the term drives one irresistibly to this conclusion. A mere diversity of opinion is not a conflict, because the term "conflict" means something more than difference. It signifies a collision with a result following of supremacy of one and inferiority of the other.

It is not a matter affecting the public, nor of the smallest national concern, that the Supreme Court of Ohio may have reached one conclusion in construing a certain will, and that the United States Circuit Court of Appeals for the Sixth Circuit arrived at a different conclusion in construing the same will, where in each case there is totally separate and distinct property involved. That totally separate and distinct property was involved in the two cases is clearly demonstrated by the opinion of Circuit Judge LURTON in 171 Federal, heretofore referred to: and no serious insistence to the contrary is made by counsel for petitioner.

It will be apparent, upon an examination of the record, that the judgment of the Circuit Court of Appeals can, without the remotest possibility of conflict, be fully executed, and no effect thereby produced upon the judgment of the Supreme Court of the State of Ohio. Each Court may fully and specifically execute its own judgment or decree, and in no way interfere with the other.

The Supreme Court of Ohio has decided in one case that Mr. Anderson is not entitled to the property *therein* involved. The Circuit Court of Appeals has decided in another case that Mr. Anderson is entitled to certain other property which was therein involved and *which was not involved in the State Court*

case. Mr. Anderson's denial of title to the property involved in the State Court in no way interferes with his right of possession of the property involved in the Federal Court. The Federal Court's writ of possession to be issued to Mr. Anderson will in no way disturb the possession of the defendants in the State Court of the property therein involved.

When reduced to its last analysis, the instant case presents a controversy involving only a matter of private interest, with no feature of public concern, gravity or importance whatever. To allow the writ applied for herein would not, I submit, be the "sparing exercise" of the power to issue it which was so emphatically dwelt upon in Forsyth vs. Hammond, *supra.*

It is my view that the congress intended, by reserving the power to this Court to issue the writ, that it should be issued wherever and whenever this Court deemed its allowance proper; but it is equally clear to me, and I submit my view with all deference, that this Court should not issue its writ in order to determine whether the Circuit Court of Appeals of the Sixth Circuit has properly construed the will involved herein, or whether or not the proper construction of that will has been given it by the Supreme Court of Ohio. There being not the remotest possibility of a clash between the officers of the respective courts, this court's interposition would be purely for the purpose of determining an academic, abstract proposition of law. The very thought and purpose of the act creating the Court of Civil Appeals would be *pro tanto* defeated if this Court should burden itself with a decision as between two other Courts who reached a different result with regard to different property, unless the nation was involved, either directly or indirectly, or unless an actual physical conflict could not be averted without such action by this Court.

I commend to this Court, as the best argument that can be adduced upon the lack of necessity or propriety for the issuance of the writ applied for herein, the very able and exhaustive opinion of Circuit Judge LURTON, rendered June 8, 1909 (171 Fed., 785).

Replies to Certain Portions of Petitioner's Brief.

Reference is made by the petitioner to the pendency in this Court of the case of *Anderson vs. United Realty Co.*, upon writ of error to the Supreme Court of Ohio; and the fact of its pendency is urged as a reason for the allowance of the writ now applied for. In this connection it is said that that case "involves the same questions of fact and law" as does the case at bar (see Brief, p. 6).

The simple answer to this statement is that this Court will, in *Anderson vs. United Realty Co.*, consider only the question of jurisdiction raised under the provisions of the Federal statutes.

It is said on page 21 of petitioner's brief that—

> "The record in this case presents questions of gravity and importance, and an irreconcilable conflict of decision between the Circuit Court of Appeals for the Sixth Circuit, and the Supreme and other Ohio courts."

I submit that the questions are "of gravity and importance" only to the parties to the suit, and not in the sense of the term as used by this Court in the reported cases upon the subject of *certiorari*.

I submit further that the opinion of Judge LURTON, in 171 Federal, 785 (advance sheet number of Oct. 7, 1909), clearly refutes the statement that "there is an irreconcilable conflict of opinion," and demonstrates that the opinion of the Supreme Court of Ohio, in construing the will involved herein, totally ignored certain provisions of that will which the Circuit Court of Appeals deemed persuasive, if not conclusive, in the result reached by it.

That there is no possibility of collision between the Federal Courts and any other State Court than the Supreme Court of Ohio is manifest from the decree entered in the United States Mortgage and Trust Company litigation by the Lucas County Circuit Court, to which Circuit Court the consolidated cases had been appealed by Mr. Anderson from the Common Pleas Court of Lucas County. This decree appears at pages 284 to 287 of the record and clearly shows that it was rendered *only as to parts of two lots not involved herein.*

Thus, the "imminent possibility of collision" referred to on page 22 of petitioner's brief is reduced to a non-existent thing of less substance than a shadow.

I feel that it is due to the Circuit Court of Appeals that the attention of this Court should be called to the following paragraph appearing on page 20 of petitioner's brief:

> "The honorable Circuit Court of Appeals having in its first decision fallen into a mathematical error with respect to the payment of this debt, in each of its two subsequent decisions declared itself without power to relieve itself or the parties from the effect of this manifest mistake of fact."

This is an injustice to the Circuit Court of Appeals which should be corrected. That Court said no such thing and nothing that could be said to approach its equivalent. No suggestion was ever made by it that any error had been committed. And a mere casual glance at the following quotation from the letter of Mr. Butler of March 2, 1860 (Record, pp. 318, 319) will sustain me:

> "Since then (Oct. 1, 1854) *the only payment made* was of $4,000. * * * In the fall of 1855, when we had the final adjustment here I agreed to pay 7 per cent. after that date and I have so computed the amount, making *$9,183.88 on 1 January last.*"

Recent Cases in Which Certiorari has been Denied.

Insistences similar to that made here for the petitioner were pressed upon the Court in the following cases, among others, and in each a *certiorari* was denied:

Gaines vs. Kahn, No. 455, October Term, 1908.
Jones vs. United States, No. 537, October Term, 1908.
McCaulley vs. Dredging Co., No. 541, October Term, 1908.
Johnston vs. Sexton, No. 545, October Term, 1908.
Westinghouse vs. Hein, No. 546, October Term, 1908.

Steamship Co. vs. Auchincloss, No. 548, October Term, 1908.
Boom vs. Lumber Co., No. 557, October Term, 1908.
Zeiger vs. Railroad Co., No. 572, October Term, 1908.
Shoe Co. vs. Lumber Co., No. 582, October Term, 1908.
Murray vs. Distilling Co., No. 625, October Term, 1908.
U. S. vs. Oil Co., No. 628, October Term, 1908.
Montgomery vs. Chetfield, No. 641, October Term, 1908.
Tube Co. vs. Tube Co., No. 650, October Term, 1908.
Ex parte Babcock, *et al.*, No. 659, October Term, 1908.
Scriben vs. Dry Goods Co., No. 679, October Term, 1908.

In nearly every one of the foregoing cases it was claimed that "questions of gravity and importance" as well as "conflicts of decisions" were presented; yet this court declined to intervene in each of them.

As late as Monday, October 18, 1909, this court declined to issue its writ in the case of *Bettis Major and A. T. Ball vs. H. C. Williamson.* In that case it was contended by the petitioners that the decision of the Circuit Court of Appeals for the Fifth Circuit was directly and irreconcilably in conflict with a decision of the Circuit Court of Appeals of another Circuit; yet this court denied the application, presumably because mere lack of harmony of decision, without attendant gravity and importance in effect is not of itself sufficient ground for awarding the writ.

I respectfully submit that the petition should be denied.

RHEA P. CARY,
Counsel for Respondent.

MESSENGER *v.* ANDERSON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 150. Argued January 19, 22, 1912.—Decided June 2, 1912.

Where the Circuit Court of Appeals has before it in the second trial of the same case, a will previously construed by it, and meanwhile the highest court of the State in which the real estate affected is situated has construed the will differently, the Circuit Court of Appeals is not bound to adhere to its previous decision as being the law of the case. It may follow, and in such a case it should lean toward an agreement with, the state court.

In the absence of statute, the phrase "law of the case," as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts gen-

erally to refuse to open what has been decided—not a limit to their power.

In a conflict between decisions of the state and Federal courts, this court is free when the case comes here.

In this case, in which the Circuit Court of Appeals construed a will as giving testator's son a life interest only with remainder that he could not affect, and the state court construed it as giving him the estate subject to the divesting clause, *held*, that the construction given by the state court was right and that the Circuit Court of Appeals should have followed it.

Quære whether the decision of the state court did not finally adjudicate the question of title as between the parties so as to be binding upon every court before which the title might subsequently be discussed.

171 Fed. Rep. 785, reversed.

THE facts, which involve the construction of a will affecting real estate in Ohio, and the question of whether the Federal courts should follow the state court in such a case, are stated in the opinion.

Mr. Harry E. King and *Mr. Clayton M. Everett*, with whom *Mr. Oliver B. Snider* was on the brief, for petitioner:

The first and second judgments of the Circuit Court of Appeals each reversed the preceding judgment of the Circuit Court, and remanded the case generally, without other direction, and therefore, until the last judgment of the Circuit Court, no final judgment was rendered. *Aurora City* v. *West*, 7 Wall. 82; *Smith* v. *Adams*, 130 U. S. 167.

Respondent acquired no title under the will of his grandfather. Thereby testator intended to give his sons, or the survivor of them, an estate in fee simple, subject to defeasance should they or the survivor of them die without issue. *Anderson* v. *United Realty Co.*, 79 Ohio St. 23; § 5970, R. S. O. (10580, Gen'l Code); *Carter* v. *Gray*, 58 N. J. Eq. 411; *Chamberlain* v. *Owings*, 30 Maryland, 447; *Piatt* v. *Sinton*, 37 Ohio St. 353; *Lambert* v. *Paine*, 3 Cranch, 97.

The decision of the Circuit Court of Appeals that under the will respondent took an estate in remainder upon the decease of his father, is contrary to long settled rule of property in Ohio. *Abbot* v. *Essex Co.*, 18 How. 202; *Parrish* v. *Ferris*, 6 Ohio St. 563; *Niles* v. *Gray*, 12 Ohio St. 320, citing and following *Abbot* v. *Essex Co.*, *supra*; *Taylor* v. *Foster*, 17 Ohio St. 166; *Piatt* v. *Sinton*, 37 Ohio St. 353; *Martin* v. *Lapham*, 38 Ohio St. 538; *Collins* v. *Collins*, 40 Ohio St. 353; *Durfee* v. *MacNeill*, 58 Ohio St. 238; *Anderson* v. *United Realty Co.*, 79 Ohio St. 23; § 5970, R. S. O. (10580, Gen'l Code); *Walker* v. *Walker*, 20 O. C. C. 409; *Darlington* v. *Compton*, 20 O. C. C. 242; *Pendleton* v. *Bowler*, 27 Cinn. L. Bull. 313.

The Federal courts must look to the law of the State in which land is situated for the rules which govern its descent, alienation and transfer and for the effect and construction of wills and other instruments conveying title thereto, and in trials at law must regard the state law as a rule of decision. Section 721, U. S. Rev. St.; *Brine* v. *Ins. Co.*, 96 U. S. 627; *DeVaughn* v. *Hutchinson*, 165 U. S. 566; *Clarke* v. *Clarke*, 178 U. S. 186; *Orr* v. *Gilman*, 183 U. S. 278; *East &c. Co.* v. *Central Co.*, 204 U. S. 266; *Olmstead* v. *Olmstead*, 216 U. S. 386.

The Circuit Court of Appeals erred in not following the Ohio decisions and statute. *Giles* v. *Little*, 104 U. S. 291; *Britton* v. *Thornton*, 112 U. S. 526; *Roberts* v. *Lewis*, 153 U. S. 367; *Little* v. *Giles*, 25 Nebraska, 313; *Yocum* v. *Parker*, 134 Fed. Rep. 205; *Bilger* v. *Nunan*, 186 Fed. Rep. 665.

For decisions construing statutes like the Ohio statute, see: *Devecmon* v. *Shaw*, 70 Maryland, 210; *Snyder* v. *Baer*, 144 Pa. St. 278; *Kiefer* v. *Keepler*, 173 Pa. St. 181; *Simons* v. *Simons*, 168 Massachusetts, 144; *Harris* v. *Dyer*, 18 R. I. 540; *May* v. *San Antonio*, 83 Texas, 502; Page on Wills, § 562, pp. 653, 654.

Independently of statute, the will devised only a de-

feasible fee. *Thompson* v. *Hoop*, 6 Ohio St. 480; *Smith* v. *Berry*, 8 Ohio, 365; other Ohio cases above cited; Schouler on Wills, § 262, p. 549.

The limitation over provided for in the will constituted a definite failure of issue; an estate tail, or an estate in remainder was not and could not have been created or implied. Kent's Comm., vol. 4, pp. 274, 275, star paging; 1 Tiffany on Real Prop., § 25, p. 63; 2 Jarman on Wills, 6th ed., Big star paging 1320; 2 Washburn, Real Prop., 5th ed., star paging 355; *Niles* v. *Gray*, 12 Ohio St. 320.

A limitation over after definite failure of issue creates a defeasible fee. *Pells* v. *Brown*, 3 Croke's Rep. 590; *DeWolf* v. *Middletown*, 18 R. I. 810; *Toman* v. *Dunlop*, 18 Pa. St. 72; *Jordan* v. *Roach*, 32 Mississippi, 481; *Daniel* v. *Thompson*, 14 B. Mon. (Ky.) 662; *Wardell* v. *Allaire*, 20 N. J. L. 6; Page on Wills, § 591.

The construction given the will by the Circuit Court of Appeals, 146 Fed. Rep. 929, rests largely upon three cases, one from Ohio, one from Georgia and the third from South Carolina, each of which has been discredited or overruled. The rule in Ohio is not as declared in *Shaw* v. *Hoard*, 18 Ohio St. 228, but the opposite as in *Anderson* v. *United Realty Co.*, 79 Ohio St. 23, and cases therein cited. In Georgia, not as in *Wetter* v. *United &c. Co.*, 75 Georgia, 540, but the opposite as in *Matthews* v. *Hudson*, 81 Georgia, 126; *Chewing* v. *Shumate*, 106 Georgia, 751; *Hill* v. *Terrell*, 123 Georgia, 49; *Kinard* v. *Hale*, 128 Georgia, 485. *Carr* v. *Green*, 2 McCord (S. C.), 75, construed a will which was given exactly the opposite construction in *Carr* v. *Jeanerett*, 2 McCord (S. C.), 66. See also *Carr* v. *Porter*, 1 McCord Ch. 60; *Shaw* v. *Erwin*, 41 So. Car. 209; *Bond* v. *Moore*, 236 Illinois, 576. Other cases overruling *Carr* v. *Green* are: *Durant* v. *Nash*, 30 So. Car. 184; *Gordon* v. *Gordon*, 32 So. Car. 563; *Powers* v. *Bullwinkle*, 33 So. Car. 293; *Thompson* v. *Peake*, 38 So. Car. 440; *Sheppard* v. *Jones*, 77 So. Car. 274.

The decision of the Circuit Court of Appeals is also opposed to the decisions of the highest court of Mississippi, where the testator resided when his will was drawn, executed and took effect. *Jordon* v. *Roach*, 32 Mississippi, 481; *Sims* v. *Conger*, 39 Mississippi, 231; *Busby* v. *Rhodes*, 58 Mississippi, 237; *Johnson* v. *DeLome*, 77 Mississippi, 15; *Halsey* v. *Gee*, 79 Mississippi, 193; and besides being contrary to the decision of the Supreme Court of Ohio is also opposed to the decisions of the highest courts of all the States comprising the Sixth Circuit. *Hart* v. *Thompson*, 42 Kentucky, 482; *Daniel* v. *Thompson*, 53 Kentucky, 562; *Harris* v. *Berry*, 70 Kentucky, 113; *Sale* v. *Crutchfield*, 71 Kentucky, 636; *Crozier* v. *Cundall*, 99 Kentucky, 202; *Smith* v. *Ballard*, 117 Kentucky, 179; *Harvey* v. *Bell*, 118 Kentucky, 512; *Rice* v. *Rice*, 118 S. W. Rep. 270 (Ky.); *Williamson* v. *Tunis*, 107 Tennessee, 83; *Mullreed* v. *Clark*, 110 Michigan, 229.

Mr. Rhea P. Cary and *Mr. C. H. Trimble* for respondent: An executory devise or bequest cannot be prevented or disturbed by any alteration in the estate out of which or subsequent to which it is limited. The executory interest is wholly exempted from the power of the first beneficiary or taker. 4 Kent's Comm. 270; *Jackson* v. *Bull*, 10 Johns. 19; *Burleigh* v. *Clough*, 52 N. H. 275.

If only a life estate is granted, a power of disposition in the life tenant does not invalidate a remainder over. *Kelly* v. *Meins*, 135 Massachusetts, 234; *Ramsdell* v. *Ramsdell*, 8 Maine, 205; *Larned* v. *Bridge*, 17 Pick. 339; *Burleigh* v. *Clough*, *supra*.

The contract of October 4, 1844, was competent evidence. Declarations by one in possession, in disparagement of his title, are admissible against those claiming under him. *Dooley* v. *Baines*, 86 Virginia, 648; *Dodge* v. *Freedmen's S. & T. Co.*, 93 U. S. 379; *Henderson* v. *Wanamaker*, 79 Fed. Rep. 738; *Baker* v. *Humphrey*, 101 U. S.

499; 2 Wigmore on Ev., § 1080; 1 Elliott on Ev. (1904 ed.), § 261; 16 Cyc. 986.

It is the duty of courts to construe wills as they find them, and not to make them. While the doctrine of implication must be resorted to cautiously in the construction of wills, the courts should not hesitate to resort to that doctrine, when thus only can the manifest intention of the testator be carried out. *Holton* v. *White*, 23 N. J. L. 330, *Lytle* v. *Beveridge*, 58 N. Y. 592; *In re Moore's Estate*, 11 Misc. Rep. 436; *Bentley* v. *Kaufman*, 12 Phila. 435; *In re McAlpin's Estate* (Pa.), 60 Atl. Rep. 321; *Beilstein* v. *Beilstein*, 194 Pa. St. 152.

Parrish v. *Ferris*, 6 Ohio St. 563; *Niles* v. *Gray*, 12 Ohio St. 320; *Taylor* v. *Foster*, 17 Ohio St. 166; *Piatt* v. *Sinton*, 37 Ohio St. 353; *Martin* v. *Lapham*, 38 Ohio St. 538; *Collins* v. *Collins*, 40 Ohio St. 353; *Anderson* v. *United Realty Co.*, 79 Ohio St. 23, can be distinguished from the case at bar.

It is essential to a complete and effectual delivery of an instrument intended to operate as a present deed, that the grantor should part with all control and dominion over it. If he retains the right to recall the deed, it cannot be considered as delivered. The same principle applies to an escrow. 1 Devlin on Deeds, § 324, p. 578, citing *Campbell* v. *Thomas*, 42 Wisconsin, 437; *Miller* v. *Sears*, 91 California, 282; *Prutsman* v. *Baker*, 30 Wisconsin, 644; *In re Cornelius' Estate*, 151 California, 550. And see *Shirley* v. *Heirs*, 14 Ohio St. 310; *Provart* v. *Harris* (Ill.), 39 N. E. Rep. 958.

A plaintiff cannot be forbidden to try facts upon which his right to relief is based before a court of his own choice, if otherwise competent. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action of ejectment for land in Toledo, Ohio,

brought by the respondent, Anderson. The case went three times to the Circuit Court of Appeals, and ended in a judgment for the plaintiff. 146 Fed. Rep. 929; 77 C. C. A. 179. 158 Fed. Rep. 250; 85 C. C. A. 468. 171 Fed. Rep. 785; 96 C. C. A. 445. The facts that need to be stated are these: In 1841 Charles Butler assigned an overdue mortgage of the land to Henry Anderson as security for a note of his own. He made default, Anderson brought a bill to foreclose, (Butler not being served with process), got a decree, bought in, and got the sale confirmed. For the purposes of this decision it may be assumed that Anderson got the land in fee simple, subject to some question as to Butler's rights. The plaintiff below, the respondent here, claimed as remainderman under the will of Henry Anderson, who was his grandfather. The petitioner claims under a conveyance from Butler. If the plaintiff's title is bad that is an end of the case.

In 1846 Henry Anderson, then domiciled in Mississippi, made his will and died, leaving two sons William and James. These sons executed deeds declaring that their father Henry held and intended to hold the land in trust to secure the payment of Butler's note, and Butler subsequently made such payments on the same that it may be assumed that unless the plaintiff has a title that his father James could not affect by the above-mentioned deed, he has none. Whether he has such a title depends on the terms of Henry's will. That instrument, after creating a general trust of substantially all the testator's property, went on thus: "Item. It is my will that when my son William arrives at the age of twenty-one years the trustees . . . shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one-half of my property reserving thereout two-fifth parts of said moiety, by valuation which my said trustees shall hold in trust and properly invest and pay over to

him at the age of twenty-five years . . . And it is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective periods of twenty-one and twenty-five years of age being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William," &c.

If these clauses were all, there would be no doubt that William and James got an absolute title when they reached the age mentioned. But a following paragraph reads, "If either of my sons die without lineal descendants the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants then" over to brothers and sisters of the testator. Later in the paragraph the testator says: "I make the following explanation: The limitations over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. Nothing in the foregoing will shall be construed as to deprive either of my sons of disposing of their portions by will on their attaining the age of twenty-one years respectively. The above limitations over shall give way to the provision of such wills." The testator's son William died in 1850, unmarried and intestate. The other son James died in 1902, intestate and leaving the plaintiff his only child.

The Circuit Court of Appeals when this case first came up held that James took only a life estate and that the plaintiff got a remainder that his father could not affect. 146 Fed. Rep. 929. But pending the proceedings another case was tried in the state courts between these same parties concerning other parcels of land in Toledo depending on the same title, in which it was decided by the lower court and affirmed on writ of error by the Supreme Court of Ohio that James took a fee subject to be defeated

only by his leaving no lineal descendant. *Anderson* v. *United Realty Co.*, 79 Ohio St. 23. *S. C.*, 222 U. S. 164. The judgment of the lower court was pleaded, but it was held by the Circuit Court of Appeals after the affirmance by the Supreme Court that its own previous decision was the law of the case and that it was not at liberty to reverse the judgment even if the matter was *res judicata* on the principle laid down in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396. See *Parrish* v. *Ferris*, 2 Black, 606. In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. *King* v. *West Virginia*, 216 U. S. 92, 100. *Remington* v. *Central Pacific R. R. Co.*, 198 U. S. 95, 99, 100. *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339, 343. Of course this court, at least, is free when the case comes here. *Panama R. R. R. Co.* v. *Napier Shipping Co.*, 166 U. S. 280. *United States* v. *Denver & Rio Grande R. R. Co.*, 191 U. S. 84. In our opinion even apart from the effect of the state judgment as an adjudication it should have been followed, if for no other reason, because at least as against the decision of the Circuit Court of Appeals it was right.

The later clauses that we have quoted from the will make a difference, it is true, according to whether the sons leave lineal descendants at their death or not. But the interest thus exhibited in descendants is satisfied by the probability that they would inherit the property or be provided for out of it. It is not shown to be so definite and paramount as to cut down the gifts imported by the previous words except in the single event in which the will does so in terms. On the contrary the still later provision that nothing shall be construed to 'deprive' the sons of the power to dispose of 'their portions' by will

indicates that the testator meant the sons to be owners of his estate, subject to the divesting clause.

We should lean toward an agreement with the state courts, especially in a matter like this. In the present instance we see no sufficient reason for refusing to follow their judgment, even if, for any cause not pointed out to us, it did not finally adjudicate the question of title as between these parties in such wise as to be binding upon every court before which that title subsequently might be discussed.

Judgment reversed.